determination that, under the circumstances, consent to the search would not break "the causal chain," *id.* 79a & at n.6, if the seizure holding were sustained.

A divided panel of the Eighth Circuit upheld the district court's decision, see Pet.App.65a; *id.* 77a (Melloy, J, concurring in result), *id.* 79a (Riley, J., dissenting). Relying on Circuit precedent "establishing that a Fourth Amendment seizure occurs when an official 'exert[s] dominion and control over the [item],'" Pet.App.72a (quoting *United States v. Gomez*, 312 F.3d 920, 923 n.2 (8th Cir. 2002)), the panel held that the "garment bag was seized within the meaning of the Fourth Amendment when Eberle had the bag removed from the bus, taken to a room inside the rear baggage terminal, and detained while the officer endeavored to locate the bag's owner and obtain consent to search the bag." *Id.* 74a.[2] In view of the

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[2] Judge McMillan further explained that "[a] bus passenger traveling with luggage placed in a common compartment of the bus does not reasonably expect that his or her luggage will be physically removed from the bus without his or her knowledge and detained so that consent to a search of the luggage may be sought," Pet.App.73a.

Concurring in the judgment, Judge Melloy agreed that the case was controlled by circuit precedent, but indicated interest in the Eighth Circuit's "re-visit[ing] the issue of what constitutes a seizure in the context of a temporary removal and inspection of packages and luggage that have been sent or checked with common carriers," *id.* 79a.

Judge Riley echoed this call for plenary consideration, but disagreed that the panel was constrained by precedent to find a seizure. He asserted that the cases relied on by the majority conflicted with other Eighth Circuit decisions, meaning that the panel was "free to chose which line of cases to follow," *id.* 80a (citing *Kostelec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220, 1228 n.8 (8th Cir.1995)), and indicated that, on his preferred standard, the government's appeal would succeed:

> I would hold law enforcement's temporary removal of a commercial bus passenger's checked luggage from a lower luggage compartment to a room inside the terminal does not constitute a seizure if the removal of the luggage does not delay the passenger's travel, affect the timely delivery of the checked luggage, or interfere with the carrier's normal processing of the checked luggage.

government's failure to appeal on the "taint" issue, see *supra*, the panel had no occasion to address the finding that the *search* was not consented-to and therefore unconstitutional.

The government petitioned for *en banc* review, renewing its "no seizure" and voluntary consent arguments – while again refraining from challenging either the "no reasonable suspicion" finding or the ruling that cor ent could not supply an independent basis for admitting the evidence.

A sharply divided *en banc* court reversed the district court's judgment. The majority opinion highlighted the importance of "speak[ing] with a clear voice when discussing the scope of the Seizure Clause" and the difficulty of reconciling Eighth Circuit cases presenting the same general question – "what constitutes a seizure in cases involving law enforcement's interference with luggage or mailed packages." Pet.App.9a-10a & n.3 (contrasting, *e.g.*, *Gomez*, 312 F.3d 920 (holding no seizure occurred when a drug interdiction officer moved package from a postal sorting area to command center twenty yards away), and *United States v. Vasquez*, 213 F.3d 425 (8th Cir. 2000) (no seizure when officers at Federal Express facility examined the outside of a package and subjected it to canine sniff), with *United States v. Morones*, 355 F.3d 1108 (8th Cir. 2004) (finding seizure when officer removed package from Federal Express conveyor belt and subjected it to canine sniff), and *United States v. Demoss*, 279 F.3d 632 (8th Cir. 2002) (same)).

The majority opinion acknowledged the central importance of *United States v. Jacobsen*, which had held that federal agents' detaining and examining a package at a Federal Express facility was a "seizure" within the meaning of the Fourth Amendment – but not an unreasonable one – but it declined to read *Jacobsen* as holding that government agents' acquisition of "dominion and control," 466 U.S. at 120, over property in

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Pet.App.80a.

itself amounts to a seizure. See Pet.App.12a ("We do not believe the Court meant to express two different standards").

Rather, relying heavily on decisions of other federal and state courts, the majority announced a three-part test: the Fourth Amendment applies *only* in instances when the individual can show – "law enforcement's detention of checked luggage [1] delays [his] travel * * * [2] delay[s] its timely delivery or [3] * * * deprive[s] the carrier of custody. Pet.App.20a. "If none of these factors is satisfied, then no Fourth Amendment seizure has occurred," *id.*

The majority described this rule, focusing "on the defendant's freedom of movement and his expectation of timely delivery of his checked luggage," *id.* 14a (citing *United States v. Lovell,* 849 F.2d 910, 916 (5th Cir.1988)), as flowing from *Jacobsen*'s identification of a "seizure" with a "meaningful interference with * * * possessory interests," see 466 U.S. at 113, expressing agreement with decisions holding that a traveler's *possessory* interests are not impaired until – and unless – retrieval is delayed, *i.e.*, that a passenger "'ha[s] no cognizable interest in repossessing his bag until the bus arrive[s]' at its destination," Pet.App.18a (quoting *United States v. Ward,* 144 F.3d 1024 (7th Cir.1998). See *id.* 20a (a "'traveler who checks his luggage has no knowledge and, in fact, no real concern as to precisely where his bag may be located within the airline's custody at any given time'") (quoting *Florida v. Goodley,* 381 So.2d 1180, 1182 (Fla. App. 1980)).

The majority further described its rule as consistent with the Fourth Amendment's general focus on expectations, citing the Seventh Circuit's observations that a passenger has "'no reasonable expectation * * * that [a] bag [will] not be touched, handled, or even removed from the bus prior to the bag's arrival,' at its destination," Pet.App.18a (quoting *Ward,* 144 F.3d at 1032), and its equation of seizure with "'interference with [a traveler's] contractually-based expectation that he would regain possession of the bag at a particular time,'" *id.*

(quoting 144 F.3d at 1033). The court described its rule as also comporting with common law principles, see *id.* 13a (noting that "the tort of conversion differs from the tort of trespass in that conversion requires 'an intent to exercise a dominion or control over the goods which is in fact inconsistent with the [owner]'s rights") (quoting Keeton, et al., PROSSER AND KEETON ON THE LAW OF TORTS § 15 at 92, 102 (5th ed.1984)), and supported by this Court's recognition that the Fourth Amendment is unconcerned with merely "technical" or "inconsequential" violations. Pet.App.12a, 19a.

Applied to Mr. Va Lerie's case, the majority held, this test established that no Fourth Amendment seizure had occurred. Because the events occurred during a stopover, when a passenger would not have expected to have control over checked luggage, and because it appeared that a search could have been completed in time for Mr. Valerie and the bag to re-board, see Pet.App. 22a – the court concluded, neither his possession nor his freedom of movement had been meaningfully interfered with.

Answering the dissent's insistence that precisely the same could be said about *Jacobsen*, *see infra*, the majority pointed to the third element of its test: it was "law enforcement's exertion of dominion and control over * * * in contravention to Federal Express's *custody* of the package," that made it a "seizure under the Fourth Amendment," Pet.App.12a (emphasis added); the agents here did not "deprive[] Greyhound of its custody of the luggage," *id.* 13a. Unlike in *Jacobsen*, where "the DEA agents * * * took custody of the package by exerting dominion and control over it for their own purposes," *Id.* 23a n.9, the majority explained, the NSP's removal of the bag to the room in the terminal was done as an accommodation to Greyhound, which did not want passengers in the refueling area.

The majority opinion then overturned the district court's finding that the *search* of the garment bag had not been voluntarily consented to. After highlighting that the magistrate

judge had recommended finding voluntary consent and cataloguing the various factors supporting such a finding, the opinion took issue with the district court's emphasis on the fact that the encounter had occurred in a private room, with agents already in possession of the bag, deserved significant weight:

> Given our holding that the NSP was not constitutionally forbidden to remove the checked luggage from the bus to present the luggage to Va Lerie to seek consent to search, we would be hard-pressed to conclude such a presentation would be any different than simply asking Va Lerie for permission to search his checked luggage.

Pet.App.26a-27a.[3]

In an opinion for five Eighth Circuit judges, Judge Colloton dissented, describing the holding of the en banc majority as "conflict[ing]" with *Jacobsen*, Pet.App.27a, explaining that "[a]bsent a revision of doctrine by the Supreme Court, the NSP investigators effected a 'seizure' of Va Lerie's bag." Pet.App.34a.

Jacobsen, the dissent explained, had found a seizure "*clearly*" effected, Pet.App.34a (citing 466 U.S. at 120 n.18) (emphasis in Eighth Circuit opinion), in circumstances where neither of the factors that other courts identified as constitutionally determinative was present. Given that the defendants in that case were intended recipients of a package, it was plain that the DEA's actions would "not delay any travel by the Jacobsens or impact their freedom of movement," *id.* 30a, and the opinion likewise had found the package seized without any discussion of whether delivery had been delayed or indication that delay was constitutionally significant, *id.*

Nor did the DEA's actions, Judge Colloton explained, affect Federal Express's "custody" in any way that could be

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[3]In a one-sentence opinion, Judge Wollman stated that he concurred in all but footnotes 8, 9, and 11 of the majority opinion, describing these as "unnecessary to the resolution of the issues before [the court]," Pet.App.27a.

distinguished from the law enforcement agents' actions here. Far from making a "finding that the investigators' physical possession and control of the luggage for investigative purposes did not amount to 'custody[,]'" he explained, the "district court found that the NSP investigators 'removed,' 'detained,' 'seized,' 'sequestered,' and exerted 'thorough 'dominion and control' over the garment bag," Pet.App.32a n.12 (citing district court findings). But "if law enforcement's physical possession and control of Va Lerie's luggage – in a room inside the bus terminal without Greyhound personnel present – *did not* temporarily deprive Greyhound of its custody of the luggage, then neither did the DEA's possession of the Federal Express package in *Jacobsen* deprive the courier of *its* custody," *id.* 31a (emphasis added).

Nor, the dissent continued, could the decisions cited by the majority, emphasizing "expectations" and "possessory interests" account for *Jacobsen*'s holding. If "'reasonable expectations for how [property] might be handled,'" *id.* 32a (quoting majority opinion), had been significant, the DEA agents in *Jacobsen* – who "merely replicated what Federal Express itself already had done," *id.* (citing 466 U.S. at 119-20) – would not have effected a seizure. And far from asserting especially strong "possessory interests," the seizure claim in *Jacobsen* had been advanced by "mere[] intended recipients who had never actually possessed the package." *Id.* 34a.

Jacobsen, the dissenting judges concluded, must be read as holding that a seizure occurs when government "'agents[] assert[] dominion and control over [a] package and its contents,'" Pet.App.29a (quoting 466 U.S. at 120) – whether or not the factors highlighted by the majority are present. Under that rule, the dissent concluded, the district court's "seizure" conclusion was inescapably correct.

REASONS FOR GRANTING THE PETITION

This case concerns the meaning of the Fourth Amendment's prohibition on unreasonable *seizures* of property, a protection

"not much discussed in [this Court's] cases,'" *Jacobsen*, 466 U.S. at 113 n.5, but distinct from – and no less important than – the Amendment's prohibition of unreasonable searches. See *Arizona v. Hicks*, 480 U.S. 321, 328 (1987) (the interest protected by the injunction against unreasonable seizures is not "of inferior worth"); *Soldal v. Cook County*, 506 U.S. 56, 68 (1992) (rejecting conclusion that Fourth Amendment only "nominally applies" to seizures if a privacy interest is not invaded).

Although the question decided below is essentially the same one addressed by this Court in *Jacobsen* – how the prohibition applies to government actions respecting "effects" (*e.g.*, a bus passenger's checked baggage) that have been temporarily entrusted to a common carrier, delivery service, or bailee – lower courts continue to approach and resolve it in ways that are inconsistent with *Jacobsen* and with one another.

In its decision, the Eighth Circuit – after highlighting the extent of disagreement this question has engendered and the importance of articulating a single, clear answer – cast its lot with courts that have held that property is *not* "seized" within the meaning of the Fourth Amendment when government agents act affirmatively to acquire possession and control of it, absent a *further* showing that the actions adversely affect the owner's repossession, *e.g.*, by delaying his claiming checked luggage or receipt of a package. Cf. *Soldal*, 506 U.S. at 62 (noting "Whether the Amendment was in fact violated is, of course, a different question" from whether it applies).

These decisions (and the majority opinion below) have explained this limitation as flowing from *Jacobsen*'s statement that "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property," 466 U.S. at 113. But as the dissenting judges below explained, both the result reached by the Eighth Circuit majority and the Fourth Amendment rule it embraced are irreconcilable with the *holding* of *Jacobsen*,

which found property to have been "clearly" seized based on law enforcement's "dominion and control," under circumstances when the Eighth Circuit majority's three-factor test would not have been satisfied.

In addition to its conflict with directly controlling precedent, the approach adopted by the Eighth Circuit decision fails to bring clarity to the seizure question and, in fact, adds to the uncertainty and inconsistency that have long attended this basic – and ubiquitous – question of federal constitutional law. Other courts have interpreted *Jacobsen* as did the dissenting judges below, and many other decisions, citing this Court's decision in *United States v. Van Leeuwen*, 347 U.S. 249 (1970), have treated government actions as Fourth Amendment seizures that the Eighth Circuit's test would place outside the Constitution's reach.

In view of the large practical importance of the question involved – and the significant misunderstanding of its precedents evinced in the lower courts – this Court should grant review and reaffirm that law enforcement actions that entail affirmatively asserting possession and control over personal property *are* "seizures" subject to the Constitution's "reasonableness" limitation, whether or not they are completed during the time that an owner has entrusted his property to a common carrier or bailee.

I. The Eighth Circuit's Rule And The Decisions on Which It Relies Conflict With The Controlling Decision of This Court

Although the Eighth Circuit majority repeatedly cited *Jacobsen* – and indeed presented its rule as a gloss on that opinion's language – both the result reached below and the broader rule the Eighth Circuit embraced conflict with this Court's controlling interpretation of the Fourth Amendment.

As the dissent's careful reading of precedent established, the two factors identified as determinative of a Fourth Amendment seizure in the decisions relied upon by the majority –

interference with travel and delay in delivery – were both conspicuously absent in *Jacobsen*.

The defendants in that case were addressees of *a package* – not travelers, so their "freedom of movement" was not even implicated. Compare *United States v. Place*, 462 U.S. 696 (1983) (when police detain the possessions of individuals who are traveling, the Fourth Amendment's limitations on seizures of persons and property often overlap).[4] And if their contractual right to "timely delivery," Pet.App.20a, were the only "possessory interest" protected by the Fourth Amendment's reasonable seizure limitation, this Court's holding that a seizure "clearly" occurred when government agents took control of the package would be inexplicable. The *Jacobsen* opinion "in no way relied on potential delay in announcing [its legal] conclusion," Pet.App.31a, and, as Judge Colloton explained, the

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[4] The defendants in *Jacobsen* claimed that Drug Enforcement Agency personnel, who had been summoned to a Federal Express facility by employees who had noticed a suspicious "white powdery substance" while inspecting a package that had become damaged in transit, 466 U.S. at 111, violated their Fourth Amendment rights, by taking the box and examining its contents – and ultimately performing a chemical test on a trace amount of the powder – without obtaining a warrant.

The Court explained that the agents' actions – and the Fourth Amendment claims – should be understood as involving "two steps," *id.* at 119, those relating to (1) their examination of the box and (2) the chemical test of the powder. Although the Court held that neither step entailed a "search" for Fourth Amendment purposes, it held that *both* triggered the Fourth Amendment's protection against unreasonable seizures.

> Although respondents had entrusted possession of the items to Federal Express, the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a "seizure * * * *

466 U.S. at 120 n.18; *id.* at 124-25 (by converting a "temporary deprivation of possessory interests into a permanent one," the field test was a "seizure," requiring independent Fourth Amendment scrutiny). The Court concluded that neither seizure was constitutionally "unreasonable," finding that each fell within a recognized class of cases in which the Fourth Amendment permits warrantless seizure (with probable cause), *id.* at 121, 125.

opinions in that case give every indication that there had, in fact, been little or no delay: "only a 'short time' [after the investigation] * * * the package was 'rewrapped and Federal Express was directed to deliver the package to the addressee shown on the label,'" *id.* (citing 683 F.2d at 297 and 466 U.S. at 111-12).

Significantly, the Eighth Circuit majority did not offer any answer to this demonstration – and it thereby effectively conceded (1) the conflict between the precedent of this Court and the decisions it cited, which had identified these factors as determinative of the Fourth Amendment question – and (2) that, to the extent its standard actually *is* "consistent with" the approach adopted in those decisions, Pet.App.20a, it, too, is in conflict with *Jacobsen*.

The majority instead undertook to show that *Jacobsen* could be explained the basis of a third factor, "custody," but, as the dissent again showed, this rationale fares no better in distinguishing the two cases.

As a matter of common sense (and common law), the officers here surely *did* have "custody" of the garment bag when they took it to a room in which no Greyhound employee was present. But, as the dissenting judges explained (Pet.App.31a):

> If law enforcement's physical possession and control of Va Lerie's luggage – in a room inside the bus terminal without Greyhound personnel present – *did not* temporarily deprive Greyhound of its custody of the luggage, then *neither did the DEA's possession of the Federal Express package in Jacobsen deprive the courier of its custody* of the package. Although "NSP removed Va Lerie's checked luggage from the lower luggage compartment to a room inside the terminal at Greyhound's request" [Pet.App.22a], Federal Express surely was not "deprived of custody" when the Jacobsens' package was "placed on a desk" in the Federal Express office, 466 U.S. at 111, and examined by a DEA agent, after Federal Express employees "invited the federal

agent to their offices for the express purpose of viewing" the contents of the package. *Id.* at 119.

Nor was the Eighth Circuit correct in explaining *Jacobsen* as resting on the finding that the government agents "converted the package," Pet.App.23a n.9, *i.e., because* "the DEA agents were not going to return [it] * * * to Federal Express until after the agents searched the package and tested the white powdery substance."*Id. Jacobsen* did not conclude, nor could it have, that the agents converted *the package* – which was forwarded (contents and all) to the defendants in short order. It held that the *field test* "converted" a trace amount of defendants' property – and therefore required *further* Fourth Amendment justification. See 466 U.S. at 125 (holding that, under the circumstances, probable cause, but no warrant, was constitutionally "reasonable").[5]

Far from supporting the notion that a Fourth Amendment "seizure" is coextensive with kind of permanent deprivation that defines the common law tort of conversion, Pet.App.17a – a proposition that is *contradicted* by almost every one of this Court's seizure cases, see, *e.g.*, *Terry v. Ohio*, 392 U.S. 1, 19 (1968) – *Jacobsen* stands for the opposite rule: that the interference entailed by government's taking "temporary" possession is itself sufficient to trigger the Constitution. See 466 U.S. at 124, 125; *United States v. Paige*, 136 F.3d 1012, 1022 (5th Cir. 1998) (holding that *Jacobsen* applies *only* to temporary, not permanent seizures).

Finally, while this Court's property seizure jurisprudence is spare – and *Jacobsen* is its most directly controlling precedent – that case does not stand alone in condemning a test that makes delay in repossession the touchstone for whether a seizure occurs. The six Justices to address the question in *Segura v.*

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[5]The Nebraska police here took the bag for *their own purposes* – to seek out its owner and obtain permission to search – and the majority cited no basis for assuming that the officers would have relinquished the bag to Greyhound before they had accomplished that objective.

United States, 468 U.S. 796 (1984), recognized that the fact that defendants were in police custody during the entire time that police exercised "dominion and control" over their apartment, *id.* at 822 (Stevens, J., dissenting), could not mean that there had been no *seizure*. Four Justices (in an opinion by the author of *Jacobsen*, issued three months earlier) noted that "[t]he cases are legion holding that a citizen retains a protected possessory interest in his home and the effects * * * even though that person is in custody," *id.* at 826, while Chief Justice Burger and Justice O'Connor identified the fact that the defendants would not have been able to occupy the apartment as a factor bearing on the seizure's reasonableness. *Id.* at 813. Likewise, the Court in *Soldal* (see 506 U.S. at 65) highlighted that the various opinions in *Cardwell v Lewis*, 417 U.S. 583 (1974) had found a seizure, although both the car's owner "and the keys to his car were already securely in police custody," *id.* at 598. And while *Place* involved luggage taken directly from a traveler's possession (rather than a common carrier), it expressly identified the prospect that a "brief detention" of luggage might occur after the "*owner has relinquished control of the property to a third party*," as a consideration bearing on the appropriate standard of Fourth Amendment reasonableness – rather than one that would defeat the Constitution's application entirely. See 462 U.S. at 705 (emphasis added).

II. The Decision Below Adds To The Division and Inconsistency Among The Lower Courts

Even if the decision below had succeeded in its stated objective of bringing clarity and coherence to that Circuit's Fourth Amendment seizure law, but see Part B. *infra*, the problem of "decisions in the Fourth Amendment seizure area [that] do not clearly enunciate and faithfully apply a consistent standard" is not confined to the Eighth Circuit. Pet.App.97a (panel dissent). The test announced below conflicts both explicitly and implicitly with those of other courts of appeals and State courts and indeed appears to be in significant tension

with the "line[] of authority," *id.* 80a, it repeatedly declared it was relying on. The same reasons that led the Court of Appeals to hear this case en banc explain why the question presented warrants this Court's review:

> It is absolutely critical that citizens and law enforcement understand what the Fourth Amendment protects * * * * Our court should uniformly resolve Fourth Amendment seizure cases to help our citizens understand the freedoms guaranteed by their Constitution. Consistent resolution of these cases also will ensure law enforcement fulfills its solemn duties in a constitutional manner. Although any debate over the scope of the Seizure Clause of the Fourth Amendment necessarily and rightly concentrates on the rights of our citizens, there should be little debate that law enforcement officers must understand what conduct the Fourth Amendment authorizes and what conduct it condemns.

Pet.App.88a (panel decision) (Riley, J., dissenting).

A. The Eighth Circuit's Rule Conflicts With Decisions of Other Courts

As the majority opinion below accurately indicates, many of the federal courts of appeals (and a number of State appellate courts) have expressly held that seizure of property occurs if, and only if, delivery or travel is delayed. See, *e.g., United States v. Johnson,* 990 F.2d 1129, 1132 (9th Cir.1992); *Ward,* 144 F.3d 1024 at 1031-32; *Lovell,* 849 F.2d at 916; see also *Montana v. Ochadleus* 110 P.3d 448,455 (Mt. 2005) (alternative holding that detention of property without delay does not "constitute a seizure under the Fourth Amendment"); *Indiana v. Rios*, 762 N.E.2d 153, 158 (Ind. App. 2002) ("there is no seizure of a mailed package * * * when it is briefly detained for further law enforcement investigation and its delivery is not substantially delayed. Because there is no seizure, the Fourth Amendment is not implicated, and law enforcement officials need not possess 'reasonable

suspicion'").[6]

But as the Supreme Court of North Dakota recently observed, this approach has not received "universal acceptance," *State v. Ressler*, 701 N.W.2d 915 (N.D. 2005); accord *Ohio v. Knight*, 679 N.E.2d 758, 760 (Ct. Comm. Pleas 1997) (acknowledging "split of federal authority on this issue"). A number of decisions have expressly rejected the proposition that "no seizure occurs where the government's investigation * * * would not delay the shipment of an individual's package if the test returned negative," *Ressler*, 701 N.W.2d at 919, and a much larger, and more stable, body of case law reaches results that are irreconcilable with the test embraced below and the reasoning on which it rests.

Ressler, a 2005 opinion of the highest court of a State within the Eighth Circuit, examined the decisions relied on by the *en banc* majority below, as well as *Jacobsen*, which it described as holding that "agents 'clearly' seized a Federal Express package when they took custody of the package at the shipper's facility and exerted dominion and control over the package for law-enforcement purposes." 701 N.W.2d at 920. Noting that *Jacobsen* "did not find it necessary to determine that an on-time delivery was frustrated before labeling the government's actions a seizure," *id.*, the State Supreme Court sided with the line of Eighth Circuit authority rejected below, explaining

> We believe that the *Morones* and *Jacobsen* rationale is sound. It seeks to recognize and validate the minimal, yet ever-present, possessory rights an individual maintains in shipped articles. Further, it provides some mechanism to check what would otherwise be a nearly unrestrained power of government to temporarily confiscate any shipped package.

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[6]As Judge Colloton noted, however, the federal cases cited by the majority did not "discuss[] the Supreme Court's analysis of the initial seizure in *Jacobsen*." Pet.App.34a n.14.

Id. Accord *Knight* 679 N.E.2d at 761 (holding that a brief detention of package "must be based upon reasonable, articulable suspicion, premised on objective facts, that the package contains contraband or evidence of a crime," explaining that "to require less as advocated by the state of Ohio would confer on law enforcement officials unbridled authority that was repugnant to the Framers of our Constitution").[7]

In *Illinois v. McPhee*, 628 N.E. 2d 523 (Ill. App.1993), the court held an envelope was unconstitutionally seized when a police officer "took possession of it," briefly placing it in a locked police car – even though he returned it to Federal Express for timely delivery. Rejecting the trial court's holding "that under principles of bailment law[,] Federal Express had a right to transfer possession of the envelope to the police," *id.* at 530, the court found a Fourth Amendment violation because "the characteristics of the envelope which [the police officer] stated caused him to seize it were not sufficient to give him 'reasonable suspicion' that the envelope contained narcotics," *id.* See also *Illinois v. Shapiro,* 687 N.E.2d 65 (Ill. 1997) (affirming that the "reasonable articulable suspicion standard" is "legally appropriate" in determining whether the police lawfully "detain and investigate [a] package"). The court in *Florida v. LaSalla*, 536 So.2d 1037 (Fla. App. 1989) (per curiam), held that police could not seize a suitcase from an airline conveyor belt without "reasonable suspicion," *id.* at 1038, over the dissenting judge's objection that "'seizure of luggage with no deleterious effect on the air traveler,' simply does not raise a fourth amendment issue." *Id.* at 1040 (Gunther,

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[7]In fact, *Ressler* held that *probable cause* was required under circumstances where it appeared that there would have been no delay in delivery – on the ground that by transporting the package from a private shipping store to a law-enforcement facility the police had gone beyond the kind of detention that could be supported by "reasonable suspicion." 701 N.W.2d at 920.

J., concurring in part and dissenting in part) (quoting *United States v. Puglisi*, 723 F.2d 779, 788 (11th Cir.1984)).[8]

But the instances of *acknowledged* disagreement are an unreliable indicator of the extent to which the lower courts are applying different standards and reaching inconsistent results. For while decisions within the Eighth Circuit have long discussed the question as involving a disagreement over the meaning of *Jacobsen*, numerous other courts have treated cases involving seizure of property in transit as governed by *Van Leeuwen*, which they have read as establishing that the Fourth Amendment requires objective "reasonable suspicion" in order to detain packages even briefly. See *United States v. Robinson*, 390 F.3d 853, 870 (6th Cir. 2004) ("reasonable suspicion * * * is necessary in order to briefly detain a package for further investigation, such as examination by a drug-sniffing dog"); *United States v. Glover*, 104 F.3d 1570 (10th Cir. 1997) ("In this Circuit, it is clear that a temporary detention of mail for investigative purposes is not an unreasonable seizure when authorities have a reasonable suspicion of criminal activity") (citation omitted); *United States v. Dennis*, 115 F.3d 524, 532 (7th Cir. 1997) ("the issue is whether the postal inspectors had a reasonable suspicion of criminal activity at the time they detained the package"); see *id.* at 536 (Ripple, J., concurring in

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[8]In *Colorado v. Ortega*, 34 P.3d 986 (Colo. 2001), the State Supreme Court, while noting that "moving luggage short distances * * * do[es] not result in a seizure," found a suitcase to have been seized when an "officer, accompanied by Defendant, carried the suitcase back to the garage where Defendant was * * * questioned." The fact that the "officers' actions in no way delayed the departure of Defendant's bus," the Court held, did not place the appellant's claim beyond the Fourth Amendment's concern: rather, "under these circumstances, there was a seizure * * * because the officers' conduct caused a 'meaningful interference' with Defendant's possessory interests in the suitcase, and the officer exercised control over Defendant's property." *Id.* at 994 (quoting *Jacobsen* and citing *Place*); see also *Virginia v. Hurley*, 548 S.E.2d 266 (Va. App. 2001) (analyzing "on-the-spot" examination of Federal Express package for "reasonable, articulable suspicion").

part and dissenting in part) (arguing that evidence should have been suppressed based on the absence of a "particularized and objective basis for suspecting * * * the particular package] stopped of criminal activity") (citation omitted); *United States v. Banks* 3 F.3d 399, 400 (11th Cir. 1993) (requiring "[r]easonable suspicion * * * from specific and articulable facts and rational inferences therefrom to detain the package"); *United States v. Aldaz*, 921 F.2d 227, 229 (9th Cir.1990) ("Postal authorities may seize and detain packages if they have a reasonable and articulable suspicion of criminal activity").[9]

A number of these decisions have been rendered by the same courts whose opinions decisions were cited below as embodying the uncompromising version of the "no delay, no seizure" standard. Compare, *e.g. Dennis* and *Robinson* with *Ward*, 144 F.3d 1024, and *United States v. Gant*, 112 F.3d 239 (6th Cir.1997) (cited at Pet.App.21a). Indeed, *Robinson*, after describing its facts as "closely analogues" to those in *Gant* – which it accurately characterized as holding that a detention "did not constitute a * * * seizure," 360 F.3d at 869 – then explained and applied the "analytical structure" that governs when a package is detained: *i.e.*, one where reasonable suspicion is required.

The fundamental problem presented by this decisional pattern becomes more clear in light of these courts' (and this Court's, see, *e.g. Place*, 462 U.S. at 705 n.6) acknowledgment that seizures of travelers' checked luggage are of more serious Fourth Amendment concern than seizures of mail. See, *e.g.*, *United States v. England*, 971 F.2d 419, 420 (9th Cir. 1992) ("a person who deposits an item in the United States mail retains

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[9]Because the defendants in *Jacobsen* had conceded that the agents had probable cause, the Court was only required to decide that, under the circumstances, a seizure based *without a warrant* was constitutionally reasonable. See 466 U.S. at 121-22 & n.20 (declining to address "whether the agents could have seized the package based on something less than probable cause").

far less of an interest in the mailed item than does a person who checks his luggage for transport with a common carrier"). This is so because addressees and senders of packages less substantial possessory interests than do those who accompany their property in transit; because mail does not involve even the "possib[ility]" (present in this case) of "disruption of * * * travel plans," *Place*, 462 U.S. at 708; and because of differences between the U.S. Mail and to a private common carrier, such as Greyhound. Unlike a case where a package is "detained" by the entity to whom the sender entrusted it, cases like this one involve a distinct group of government actors' taking property away from a private party for distinct, law enforcement purposes.[10]

B. The Eighth Circuit Approach Fails to Promote Clarity

In at least two respects, the Eighth Circuit's decision adds to, rather than diminishes, this pattern of uncertainty and inconsistency. First, although the opinion for the en banc majority enthusiastically endorsed decisions such as *Lovell* and *Ward* – and relied heavily on their reasoning, it is less clear that its ultimate "three-factor test," is truly "consistent with" those decisions, Pet.App.22a, which consider only *two* factors, *i.e.*, holding that "'warrantless detention [of property] for examination without reasonable suspicion is not a seizure * * * if made in such a manner that neither the traveler nor his luggage is unreasonably delayed,'" *id.* (citing and quoting *Arizona v. Peters*, 941 P.2d 228, 232 (Ariz.1997) (en banc)).

The impetus for the court's seeming doctrinal innovation is plain enough – the dissent's compelling demonstration that the prevalent two-factor test is irreconcilable with *Jacobsen* – but its significance is ambiguous. On one hand, to the extent that

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[10]To be sure, many of these decisions involve claims of unreasonably long detention, as well as lack of sufficient justification to seize the package in the first place. But almost all reject the duration-of-detention claims, and none indicates that its review of the reasonableness of the initial detention decision *depends on* the delay in delivery.

the Eighth Circuit would treat a shift in "custody" as a seizure *in the absence of an effect on timely delivery*, the test would seem to break from the "possessory interests" language that supplied the organizing principle for the case law relied on below – and the basis for those decisions' claim of fidelity to *Jacobsen*. See, *e.g.*, Pet.App.18a (noting *Ward* court's emphasis that the defendant "'had no cognizable interest in repossessing his bag until the bus arrived' at its destination"). On the other hand, to the extent that the new factor requires "*interfere[nce]* with the carrier's normal processing of the checked luggage," *id.* 80a (panel dissent), it might add nothing to the second factor: if law enforcement agents relinquish "custody" of luggage in time for it to be placed back on a bus, it might be said that the carrier's "processing" has not been "interfered with."

Even accepting that a three-factor test could provide more clarity than the "two different tests," the dissent was faulted for advocating, Pet.App.12a, the Appeals court's "custody vis-a-vis the common carrier" standard is manifestly no more "manageable," *id.* 22a, than the "dominion and control" test this Court articulated in *Jacobsen*. On the contrary, the bare fact that five federal appellate judges disagreed with seven others about whether the officers had "custody" on the relatively straightforward facts of this case casts grave doubt on claims that the new standard will aid "citizens and * * * law enforcement officers * * * [in] understand[ing] what conduct the Fourth Amendment authorizes and what conduct it condemns." Pet.App.88a.

Indeed, as the dissent showed, an ordinary citizen – even (perhaps especially) one familiar with the law – would likely conclude that the police officers, not Greyhound, had "custody" of Mr. Va Lerie's garment bag when they had "physical possession and control of [it] * * * in a room inside the bus terminal without Greyhound personnel present." Pet.App.31a. And, as the dissent explained, that citizen (and now Eighth

Circuit trial courts) would have to make sense not only of the majority's contrary conclusion, but also of the *further* assertion, pivotal to the entire decision, that there *was* "custody" in *Jacobsen*. See *supra*.

III. *Jacobsen* Correctly Interpreted The Fourth Amendment

Even if *Jacobsen* did not foreclose a rule that makes delay in repossession central to whether a *seizure* has been effected – and treats law enforcement assertion of physical possession and control over property as somehow in*sufficient*, other decisions of this Court, as well as the text and purposes of the Fourth Amendment and basic common law norms show the error of that approach.

First, law enforcement actions that entail taking physical possession and exerting "dominion and control" are, as a matter of constitutional text and common law tradition, paradigmatic "seizures." "From the time of the founding to the present, the word 'seizure' has meant a 'taking possession,'" *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (internal citations omitted). See also *Pelham v. Rose*, 76 U.S. 103, 106-07 (1869) ("by the seizure of a thing is meant the taking of a thing into possession * * * * As applied to subjects capable of manual delivery, the term means caption; the physical taking into custody"); BLACK'S LAW DICTIONARY 1363 (7th ed. 1999) (defining "seizure" as "[t]he act or an instance of taking possession of a person or property by legal right or process").

As this Court's cases have recognized, see *pp.* 14-15, *supra*, acting affirmatively to obtain possession and control, for law enforcement purposes, is itself "'inconsistent with the [owner]'s rights,'" Pet.App.13a (quoting PROSSER & KEETON), whether or not repossession is delayed. And "interference with possessory interests," instead of operating as a term of limitation, confirms that the Amendment's application extends *beyond* the core case of physical appropriation. See *Illinois v. McArthur*, 531 U.S. 326, 331-32 (2001); *United States v. 408 Peyton Rd.*, 162 F.3d 644, 649 (11th Cir. 1998) ("assertion of

physical control is [not] an essential element of a seizure" and describing *Jacobsen* as "employ[ing] the term seizure * * * to refer to governmental action that more generally deprives a property owner of significant property interests"); *Rossi v. Town of Pelham*, 35 F. Supp. 2d 66, 70 (D. N.H. 1997) (property is seized if "'a reasonable person would not have believed that he or she was free to leave [with it]'") (quoting *United States v. Allen*, 644 F.2d 749, 751 n.2 (9th Cir.1980)); cf. *United States v. Letsinger*, 93 F.3d 140, 144 (4th Cir. 1996) (rejecting claim that bag was seized by show of authority, *i.e.*, before "officers actually took it into their physical possession").[11]

To be sure, a traveler who checks baggage temporarily "relinquishes" immediate possession, Pet.App.15a, but treating such arrangements (as does the approach embraced below) as equivalent to a temporary *abandonment* – *i.e.*, entitling government agents to appropriate the item until the time arrives for the owner to reclaim it, see *Abel v. United States*, 362 U.S. 217, 241 (1960); *Hester v. United States*, 265 U.S. 57, 59

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[11] As the majority opinion below acknowledged, a passenger who travels with checked baggage plainly does not relinquish possession in the same way that a person who mails a package does. And the facts of this case involve an even more tangible interference. Although in many circumstances, a passenger will not expect to be reunited with his luggage until he reaches his final destination, see Pet.App.88a (panel dissent), Mr. Va Lerie was in the same room with his bag during the Nebraska stopover. Although *Greyhound* had undertaken to provide carriage all the way to Washington, there almost certainly was no legal barrier to Mr. Va Lerie's walking away from the bus with the bag – only the fact of the agents' possession and control.

Nor, as the facts of *Jacobsen* indicate, is it obvious that common law definitions of "possessory interests" determine which property interests are protected under the Fourth Amendment. Cf. *United States v. 1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046 (9th Cir. 1984) (describing possession as "a lesser property interest" than ownership); *Mancusi v. DeForte*, 392 U.S. 364, 367-68 (1968) (the Fourth "Amendment does not shield *only those* who have title to the searched premises * * * * [O]ne with a possessory interest in the premises, might have standing") (emphasis added).

(1924) – fails to take account of *the terms* on which personal property is entrusted to a common carrier.

Under basic common law principles, "the owner's right to exclude others from * * * using her property—perhaps the most fundamental of all property interests," *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074, 2082 (2005) – is one that is *not* relinquished when baggage is checked.[12] Contrary to the premise of the majority opinion, the rights – and expectations – of one who entrusts baggage to a common carrier are *not* limited to "timely delivery," Pet.App. 13a, but also include the carrier's duty not to use or authorize use contrary to the purposes of the bailment. Cf. *Johnson v. Hanna*, 101 N.W.2d 830, (S.D. 1960) (bailment gives rise to duties "(1) not [to] use bailed property, or permit it to be used, for any purpose without consent of bailor; and (2) [to] safely keep property and redeliver it upon demand") (citing statute); *Koch Petroleum Group, L.P. v. Alliant Energy Indus. Servs, Inc.*, 280 F. Supp. 2d 628, 630 (S.D. Tex. 2003) (conversion established "if a bailee does not return the goods to the bailor on demand" or "if the bailee uses the goods in a way inconsistent with the owner's title").

For similar reasons, "expectations," to the extent they are relevant in the seizure context, are also opposed to the Eighth Circuit majority's rule. While a bus passenger may have "less possessory interest in checked luggage than he has in carry-on luggage in his immediate possession," Pet.App.19a, the owner

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[12]See *Segura* 468 U.S. at 826 (Stevens, J., dissenting) ("Even a person is in custody after an arrest * * * still * * * owns his house and his right to exclude others-including federal narcotics agents-remains inviolate"); *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980) (noting that defendant did not claim to have retained a "right to exclude other persons from access to [friend's] purse"); *Rakas v. Illinois* 439 U.S. 128, 143 n.12 (1978); see also *Stoner v. California*, 376 U.S. 483, 489 (1964) (that "a person [who] engages a hotel room * * * undoubtedly gives 'implied or express permission' to 'such persons as maids, janitors or repairmen' to enter his room 'in the performance of their duties'" does not authorize hotel to admit police) (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)).

of a checked bag – unlike one who places baggage in an overhead compartment – *does not* "expect[] that other passengers * * * may move it for one reason or another," *Bond v. United States*, 529 U.S. 334, 338 (2000). Rather, he has a legitimate expectation that *no one* other than the carrier and its agents will handle it. Cf. *id.* at 341 (Breyer, J., dissenting) ("Privacy * * * implies the exclusion of uninvited strangers, not just strangers who work for the Government"). Thus, the common law imposed a *higher* duty of care with respect to checked bags then to luggage a traveler carries with her, see, *e.g.*, *Southeastern Greyhound Lines v Berrie*, 13 So.2d 696 (Ala. App.1943), treating a carrier as a "quasi-insurer," *Boston & Maine R. Co. v. Hooker*, 233 U.S. 97, 122 (1911) (Pitney, J., dissenting). See generally Ludington, Annotation, *Liability of Motor Carrier for Loss of Passenger's Baggage or Packages*, 68 A.L.R. 2D 1350. Cf. 18 U.S.C. § 659 (prohibiting the "unlawful[] * * * carry[ing] away [of] any baggage which shall have come into the possession of any common carrier for transportation in interstate commerce").

Nor does the common law of torts support the Eighth Circuit's decision. To be sure, "the seizure standard prohibits the government's conversion of an individual's private property," Pet. App.12a, but it does not follow that the – often indistinct – border between the torts of conversion and trespass defines the reach of the Fourth Amendment. *Both* trespass and conversion entail meaningful interference with possessory interests. See 75 AM. JUR. 2D. TRESPASS §§ 4, 16 (defining trespass to include "[t]he unlawful taking away of another's personal property * * * and the appropriation of another's property to one's own use"). The primary distinction lies in the measure of damages, see RESTATEMENT (SECOND) OF TORTS § 222A, comment c: because the "normal remedy for conversion is payment of the full value of the converted property," it is reserved for interferences so complete that the defendant "may justly be required to pay * * * the full value," *Focal Point, Inc. v. U-Haul Co. of Arizona, Inc.*, 746 P.2d 488,

489 (Ariz. App.1987). But among this Court's many cases finding seizures, such permanent appropriations surely represent the extreme, rather than the typical, case. Compare, *e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) with *Terry v. Ohio*.[13]

Under the Eighth Circuit's approach, courts *would* examine for Fourth Amendment reasonableness the initial basis for government actions that take property from common carriers – but only in instances where receipt of the property is delayed. For example, in *United States v. Hernandez*, 313 F.3d 1206, 1210 (9th Cir. 2002), the court, after stating that "'an addressee's possessory interest is in the timely delivery of a package,'" (quoting *Demoss*, 279 F.3d at 639 (Hansen J., concurring)), examined *both* whether the (seven-hour) delay was reasonable *and* whether the detention was supported by objective reasonable suspicion at its inception. Cf. *United States v. LaFrance*, 879 F.2d 1, 8 (1st Cir. 1989) (stating that "the constitutional chemistry was altered" when package did not arrive on schedule). But a rule that makes delay in delivery the determinant of *whether the Constitution applies* is not only capricious, but at odds with the basic principle that "whether a Fourth Amendment violation has occurred "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time," *Maryland v.*

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[13]Plainly, not every "technical * * * trespass" is a seizure, Pet.App.12a (quoting *United States v. Karo*, 468 U.S. 705, 712 (1984)) – but not every trespass is a technical trespass. See *Soldal*, 506 U.S. at 62 (rejecting Fourth Amendment applied only "nominally" because government action was a "seizure only in a 'technical' sense"). The action at issue in *Karo* was essentially the polar opposite of the paradigm "seizure" – the defendant's claim was that he *received* an object from the government that "contained an unknown and unwanted foreign object," *id.* The Court highlighted the far-reaching implication of recognizing such a claim: "if the presence of a beeper in the can constituted a seizure merely because of its occupation of space, it would follow that the presence of any object, regardless of its nature, would violate the Fourth Amendment," *id.*

Macon, 472 U.S. 463, 469 (1985); see *id.* (subsequent events should not "retrospectively transform [lawful action] into [a] warrantless seizure").

A blanket exemption for law enforcement actions that do not result in delayed repossession is at odds with an "essential purpose" the Fourth Amendment: "to impose a standard of reasonableness upon the exercise of discretion by * * * law enforcement agents." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (citations and internal quotation marks omitted). Although the right to seize property no longer "depends upon the assertion by the Government of a * * * superior [*property*] interest," *Warden v. Hayden*, 387 U.S. 294, 303 (1967), the Amendment still requires that it have "constitutional grounds" before invading protected interests for law enforcement purposes. *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring); *Soldal*, 506 U.S. at 68 ("an officer who happens to come across an individual's property in a public area [may] seize it only if Fourth Amendment standards are satisfied").

Accordingly, when as here, "the primary purpose of [government action] * * * is to uncover evidence of ordinary criminal wrongdoing," *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000), the usual rule is that there be "some measure of individualized suspicion," *id.* at 41, and in the infrequent instances where the Court has held detentions (or searches) reasonable without requiring individualized suspicion, it has emphasized the general, uniform application of the practices at issue. See *Michigan Dep't Police v. Sitz*, 496 U.S. 444, 453 (1990) (distinguishing *Prouse* on this basis); *Illinois v. Lidster*, 540 U.S. 419, 425 (2004) ("an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual"); cf. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) ("principles of law which officials would impose upon a

minority must be imposed generally").[14]

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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[14]This distinction supplies one of the principal rationales for decisions upholding the "Federal Government's practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive." *NTEU v. Von Raab*, 489 U.S. 656, 675 n. 3 (1989).

Courts have noted two other features, both of which are entirely absent from cases like this one. First, such searches – and seizures – have a specific air safety rationale – not a general law enforcement purpose. See *United States v. Allman*, 336 F.3d 555, 557 (7th Cir. 2003) ("Airline passengers and their luggage are searched on embarking, not arriving"); *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir. Unit B 1981) (ordinary Fourth Amendment principles govern when airport security concerns are not implicated). Second, airline passengers are well aware – and expressly advised before traveling – that items of property taken on an airplane are subject to thorough government inspection.

APPENDIX

United States Court of Appeals for the Eighth Circuit

UNITED STATES of America, Appellant,

v.

Keith A. VA LERIE, Appellee.

No. 03-3394.

Submitted: April 12, 2005.

Filed: Oct. 3, 2005.

RILEY, Circuit Judge.

Keith Va Lerie (Va Lerie) was charged with possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1), after members of the Nebraska State Patrol (NSP) discovered cocaine inside Va Lerie's checked luggage at a Greyhound bus station. The district court granted Va Lerie's motion to suppress evidence, including the cocaine, concluding (1) the NSP unlawfully seized Va Lerie's checked luggage by removing it from the bus and to a room of the bus terminal to seek Va Lerie's consent to search the luggage; and (2) Va Lerie's apparent consent to a search of his luggage did not remove the taint of the unlawful seizure. This appeal primarily asks whether the NSP's removal of Va Lerie's checked luggage from the bus's lower luggage compartment to a room inside the bus terminal to seek Va Lerie's consent to search the luggage constituted a Fourth Amendment seizure. Reversing the district court's seizure decision, we hold such conduct did not constitute a seizure, because the removal of the luggage did not (1) delay Va Lerie's travel or significantly impact Va Lerie's freedom of movement, (2) delay the timely delivery of the checked luggage, or (3) deprive Greyhound of its custody of the checked luggage. This appeal secondarily asks whether Va Lerie voluntarily consented to a search of his luggage. We conclude he did. Therefore, we reverse the district court's decision granting Va Lerie's motion to suppress, vacate its suppression order, and remand for proceedings consistent with this opinion.

I. BACKGROUND

On December 23, 2002, Va Lerie was traveling on a Greyhound bus from Los Angeles, California, to Washington, D.C., when the bus stopped around noon for refueling at the Greyhound station in Omaha, Nebraska. During refueling and cleaning, Greyhound required its passengers to get off the bus and wait inside the bus terminal. NSP Investigator Alan Eberle (Investigator Eberle) was performing drug interdiction duties at the Greyhound station when Va Lerie's bus stopped for refueling. During the refueling, Investigator Eberle looked inside the bus's lower luggage compartments, and he found a newer piece of luggage displaying a baggage ticket with Va Lerie's name, but no telephone number or passenger name tag. When Investigator Eberle went to the rear baggage terminal to run a computer check of the luggage's claim number, he discovered the passenger had paid cash on the day of travel for a one-way ticket to Washington, D.C. Investigator Eberle asked a fellow law enforcement officer to remove the luggage from the bus and take it to a room inside the rear baggage terminal. Law enforcement removed the luggage from the bus and took it to the rear baggage terminal to seek the passenger's permission to search the luggage, as opposed to bringing the passenger to the bus in the refueling area, because "Greyhound does not want to have passengers walking over by the refueling area." Even though law enforcement took the luggage to the rear baggage terminal, Investigator Eberle testified the luggage "was not in our custody[, but] was still in Greyhound's custody."

Investigator Eberle then paged Va Lerie, who approached the ticket counter. Investigator Eberle, wearing jeans, a t-shirt and a winter coat, displayed his badge, identified himself as a law enforcement officer, and informed Va Lerie he was not in trouble or under arrest. After Va Lerie agreed to speak with Investigator Eberle, Va Lerie displayed his bus ticket and identification, which matched the information on the luggage which had been removed from the bus. Va Lerie then agreed to follow Investigator Eberle to a room in the rear baggage

terminal where Va Lerie's luggage was being held. The room had two open doors, and one or two other officers were already inside the room. Va Lerie confirmed the luggage belonged to him. Investigator Eberle then declared he was a narcotics investigator who was watching for people who might be transporting illegal drugs. When Investigator Eberle sought permission to search the luggage, Va Lerie made an affirmative verbal response to the request for consent to the search. After Va Lerie verbally consented to a search of his luggage, another officer took approximately one minute to execute the search. During the search, Va Lerie never objected, but he claimed the luggage actually belonged to a friend. Law enforcement discovered five vacuum-sealed bags containing cocaine inside Va Lerie's luggage.

Va Lerie was charged with possession with intent to distribute 500 grams or more of cocaine. 21 U.S.C. § 841(a)(1)-(b)(1). In two separate motions, Va Lerie moved to suppress the evidence discovered from the December 23 search, arguing the search violated the Fourth Amendment because (1) the search was conducted without a search warrant, and (2) Va Lerie did not knowingly, intelligently, and voluntarily consent to the search.[1] Nothing in Va Lerie's motions claimed his luggage had been unlawfully seized when the luggage was removed from the luggage compartment to the rear baggage terminal.

At the beginning of the suppression hearing in front of a magistrate judge, Va Lerie's attorney stated, "With respect to [the motions to suppress], Judge, very simple. Question of consent, no consent. Bus stop." The government agreed "[t]he issue on the search is simply whether ... consent exists or doesn't exist." During the suppression hearing, Va Lerie's attorney implied, for the first time, he also was arguing an

[1] Va Lerie also moved to suppress statements he made on December 23. The district court suppressed those statements, and they are not an issue in this appeal.

unconstitutional seizure occurred. At that point, the magistrate judge informed Va Lerie's attorney his suppression "motion deals with a search of the bag and probably not the seizure of the bag." Va Lerie's attorney replied, "That's not the input. It's a Fourth Amendment violation. I'm not restricting it to-he never consented to that being-that bag being seized and searched." At that point, the magistrate judge allowed Va Lerie to expand his motion to suppress to include an unconstitutional seizure argument.

With the seizure issue before the court, the magistrate judge repeatedly asked Va Lerie's attorney to explain how "the relocation of the garment bag" from the lower luggage compartment to a room inside the terminal, in compliance with Greyhound's request not to take passengers to the refueling area, constituted a seizure under the Fourth Amendment. Va Lerie failed to provide the judge with authority supporting his position. The government then asked the judge to force Va Lerie "to establish some case law that I could respond to that somehow makes this removal of the bag from the bus in the cleaning area to the baggage room to present it to its owner is a constitutional violation." Va Lerie's attorney failed to respond to the government's plea for authority to support the seizure contention. The magistrate judge then gave the parties opportunities to file post-hearing briefs, which only the government filed. Noting Va Lerie did not file a brief and never cited a single authority supporting his seizure position, the government noted it did not know of any authority supporting Va Lerie's seizure argument. Thus, the government focused its argument on the consent-to-search issue. Nonetheless, the government maintained "there is no constitutional issue in the officers removing the bag from the bus in the cleaning area to the baggage room which procedure was the one Greyhound, the bailee of the bag, had asked the officers to follow."

The magistrate judge determined the removal of Va Lerie's luggage to a room inside the rear baggage terminal was not an

unreasonable seizure under the Fourth Amendment because (1) Investigator Eberle had "the requisite level of reasonable articulable suspicion in order to briefly detain the bag," and (2) "the removal of the bag was done in accordance to an understanding between Greyhound and the NSP to prevent passengers from walking into the refueling area." After judging the credibility of both Va Lerie and Investigator Eberle, the magistrate judge concluded Va Lerie voluntarily consented to the search of his luggage. In support of this conclusion, the magistrate judge found (1) Va Lerie, a 37-year-old with three years of college education, verbally consented to the search; (2) Va Lerie understood Investigator Eberle's questions; (3) Va Lerie was not impaired; (4) Investigator Eberle displayed his badge, explained he was a narcotics officer, informed Va Lerie he was not in trouble or under arrest, asked Va Lerie to follow him to the rear baggage terminal, and asked Va Lerie for consent to search his luggage; (5) the search occurred in a room with two open doors in the presence of two to four officers; and (6) no evidence showed Va Lerie was under coercion or duress during his encounter with law enforcement. Based on findings that law enforcement had reasonable articulable suspicion to detain Va Lerie's luggage and Va Lerie voluntarily consented to the search of his luggage, the magistrate judge recommended the district court deny Va Lerie's motion to suppress the evidence obtained as a result of the search of the luggage.

Va Lerie objected to the magistrate judge's recommendations that (1) the seizure of Va Lerie's luggage was reasonable, and (2) Va Lerie consented to the search. The government filed no objections to the magistrate judge's recommendation that Va Lerie's motion to suppress evidence be denied.[2]

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[2]Not relevant to this appeal, the government objected to the magistrate judge's recommendation that Va Lerie's suppressed statements could not be used at trial for impeachment purposes. Overruling the government's objections, the district court suppressed Va Lerie's statements. The

Without holding another hearing, the district court considered Va Lerie's objections to the magistrate judge's report and recommendation. Addressing the seizure issue, the district court concluded "the removal of [Va Lerie's checked luggage] and its sequestration in a room of the bus terminal constituted an unconstitutional seizure in violation of [Va Lerie]'s Fourth Amendment rights because they occurred without consent, reasonable suspicion, probable cause, or a warrant."

After concluding law enforcement unconstitutionally seized Va Lerie's checked luggage, the district court then considered "whether [Va Lerie]'s alleged consent to the search of the bag removed the taint of the unlawful seizure." In addressing this issue, the district court asked whether Va Lerie's consent was voluntarily given, and, if so, whether the "consent to the search was an independent act of free will that broke the causal chain between the unconstitutional violation and the consent."

Regarding the voluntariness of Va Lerie's consent to the search of his luggage, the district court noted Va Lerie was a sober adult of normal intelligence; Va Lerie voluntarily responded to Investigator Eberle's page; Va Lerie acquiesced in Investigator Eberle's request to accompany him to a room with two open doors in the rear baggage terminal where at least two other officers were waiting with Va Lerie's luggage; Investigator Eberle testified Va Lerie consented; Va Lerie's "own testimony indicates that he did not object to the search"; Investigator Eberle was not in uniform and did not display his weapon; and no law enforcement officer directly threatened or coerced Va Lerie. Based on these findings, the district court, however, concluded Va Lerie did not voluntarily consent to the search, because "there is no reason to believe [Va Lerie] or anyone else-even most lawyers-would know that they could refuse the request to search the bag." Furthermore, the district court noted Va Lerie "was alone, in a private room, with at least

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government has not appealed that decision.

two armed police officers," and the officers already had Va Lerie's luggage when they asked for consent to search it.

The district court then considered whether Va Lerie's apparent consent purged the unlawful taint of the unconstitutional seizure. In considering this question, the district court noted little time had passed and no significant intervening events had occurred between the unlawful seizure and Va Lerie's apparent consent. The district court concluded the law enforcement officers' purpose in removing the luggage was to obtain incriminating evidence, and their accommodation of Greyhounds request not to bring passengers to the refueling area, a policy of Greyhound for over a year, was irrelevant. Thus, the district court determined Va Lerie's "apparent acquiescence [in the search] did not remove the taint of the illegal seizure." Based upon this reasoning, the court held "the evidence obtained in the search after the illegal seizure is 'fruit from a poisonous tree.'" Sustaining Va Lerie's objections to the magistrate judge's report and recommendation, the district court granted Va Lerie's motion to suppress.

Acting with the approval of the United States Solicitor General, the government timely filed this appeal. The government's main contention is the NSP's removal of Va Lerie's checked luggage from the bus's luggage compartment to the rear baggage terminal to seek permission to search does not constitute a seizure under the Fourth Amendment, "because there was no meaningful interference with [Va Lerie]'s possessory interest in the [luggage] on the part of the investigating officers." Depending on this court's resolution of the seizure issue, the government also contends the district court should have adopted the magistrate judge's recommendation that Va Lerie consented to the search of his luggage.

A divided panel of this court affirmed the district court's suppression of the evidence obtained as a result of the search of Va Lerie's luggage. *United States v. Va Lerie*, 385 F.3d 1141,

1150 (8th Cir.2004). In reaching this conclusion, the panel majority held Va Lerie's luggage "was seized within the meaning of the Fourth Amendment when [Investigator] Eberle had the bag removed from the bus, taken to a room inside the rear baggage terminal, and detained while the officer endeavored to locate the bag's owner and obtain consent to search the bag." *Id.* at 1148. Because the government conditioned its consent argument on prevailing with its seizure argument, the panel held the government "waived the argument that [Va Lerie]'s consent purged the taint of the illegal seizure if an illegal seizure occurred." *Id.* at 1148-49. Thus, the panel never considered "whether the district court clearly erred in its findings concerning the voluntariness of defendant's alleged consent." *Id.* at 1150. Two panel members urged the *en banc* court to "re-visit the issue of what constitutes a seizure in the context of a temporary removal and inspection of packages and luggage that have been sent or checked with common carriers." *Id.* at 1151 (Melloy, J., concurring); *id.* (Riley, J., dissenting). The *en banc* court vacated the panel's opinion and granted rehearing *en banc.*

II. DISCUSSION

A. Standard of Review

In considering the district court's suppression of evidence, we review the district court's conclusions of law de novo and its factual findings for clear error. *United States v. Barry,* 394 F.3d 1070, 1074 (8th Cir.2005). We will affirm the district court's order granting Va Lerie's "motion to suppress 'unless the decision is unsupported by substantial evidence, is based on an erroneous view of the applicable law, or in light of the entire record, we are left with a firm and definite conviction that a mistake has been made.' " *Id.* (quoting *United States v. Welerford,* 356 F.3d 932, 935 (8th Cir.2004) (citation omitted)). Because a seizure decision involves a pure question of law, we review de novo the district court's holding that the removal of Va Lerie's luggage from the bus constituted a seizure in

violation of the Fourth Amendment. *See United States v. Smith,* 260 F.3d 922, 924 (8th Cir.2001). We review for clear error the district court's factual finding that Va Lerie did not voluntarily consent to the search. *Welerford,* 356 F.3d at 935.

B. Seizure

Our federal Constitution mandates "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV; *see United States v. Ameling*, 328 F.3d 443, 447 (8th Cir.2003) (Fourth Amendment applies to states through the Fourteenth Amendment). It can be argued our court has not spoken with a consistent voice when considering what constitutes a seizure in cases involving law enforcement's interference with luggage or mailed packages.[3] No matter the merits of that argument, we recognize a principled interpretation, and consistent application, of the Seizure Clause of the Fourth Amendment, as explained by the Supreme Court of the United States, is vital to the protection of civil liberties

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[3] *Compare United States v. Gomez,* 312 F.3d 920, 923-24 (8th Cir.2002) (finding "minimal interference with Gomez's possessory interest" and holding no seizure occurred when a drug interdiction officer at a U.S. Postal Service facility moved a package to a command center twenty yards from a conveyor belt in a sorting area), *United States v. Vasquez,* 213 F.3d 425, 426 (8th Cir.2000) (holding no seizure occurred when drug interdiction officers at a Federal Express facility examined the outside of a package and subjected the package to a drug-sniffing dog), *United States v. Harvey,* 961 F.2d 1361, 1363-64 (8th Cir.1992) (holding no seizure occurred when police removed luggage from a bus's overhead luggage compartment to the aisle below to subject the luggage to a drug-sniffing dog), *and United States v. Riley,* 927 F.2d 1045, 1048 n. 4 (8th Cir.1991) (implying no seizure occurred when police subjected an airline passenger's checked luggage to a drug-sniffing dog), *with United States v. Morones,* 355 F.3d 1108, 1111 (8th Cir.2004) (holding seizure occurred when a law enforcement officer at a Federal Express facility removed a package from a conveyor belt to subject the package to a drug-sniffing dog), *and United States v. Demoss,* 279 F.3d 632, 636 (8th Cir.2002) (same). To the extent these decisions are inconsistent with this opinion, they are no longer controlling precedent in this circuit.

and also to law enforcement's ability to conduct itself in a constitutional manner in the modern era where law enforcement's duties safeguarding commercial transportation, whether by air, land or sea, have never been more solemn. To that end, we strive to speak with a clear voice when discussing the scope of the Seizure Clause.

The Fourth Amendment protects against both unreasonable searches and unreasonable seizures. U.S. Const. amend. IV. Not surprisingly, the Supreme Court has recognized the Search Clause is wholly distinct from the Seizure Clause, such that courts applying these clauses must understand they provide different protections against government conduct. *See Segura v. United States,* 468 U.S. 796, 806, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) ("Different interests are implicated by a seizure than by a search."). According to the Supreme Court, a Fourth Amendment *search* "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). On the other hand, a Fourth Amendment *seizure* of property "occurs when there is some meaningful interference with an individual's possessory interests in that property."[4] *Jacobsen,* 466 U.S. at 113, 104 S.Ct. 1652. While the Search Clause protects an individual's expectation of privacy, the Supreme Court has indicated the Seizure Clause relates, in part, to freedom of movement: "While the concept of a 'seizure' of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the

[4]We are not dealing with a search issue; we are confronted with a seizure issue. We also underscore this is not a seizure case involving luggage physically possessed by a commercial bus passenger. *See United States v. Place,* 462 U.S. 696, 708, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (recognizing detention of luggage within passenger's immediate possession intrudes on passenger's freedom of movement, such that the passenger's travel plans may be disrupted); *cf. Hale v. Henkel,* 201 U.S. 43, 76, 26 S.Ct. 370, 50 L.Ed. 652 (1906) (noting "a seizure contemplates a forcible dispossession of the owner"). Instead, Va Lerie's seizure case involves checked luggage not in the passenger's immediate possession.

'seizure' of a person within the meaning of the Fourth Amendment-meaningful interference, however brief, with an individual's freedom of movement." *Id.* at 113 n. 5, 104 S.Ct. 1652; *see also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) ("The initial detention necessary to procure [ ] evidence may be a seizure of the person if the detention amounts to a meaningful interference with his freedom of movement. Obtaining and examining the evidence may also be a search if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable.") (citations omitted). The Court also has stated "not every governmental interference with an individual's freedom of movement raises such constitutional concerns that there is a seizure of the person." *Skinner*, 489 U.S. at 618, 109 S.Ct. 1402. It necessarily follows that not every governmental interference with a person's property constitutes a seizure of that property under the Constitution.

After announcing a seizure of property "occurs when there is some meaningful interference with an individual's possessory interests in that property," the Court concluded in *Jacobsen* that law enforcement's exertion of dominion and control over private property for its own purposes constituted a seizure in that case. Thus, the facts of *Jacobsen* shed some light on how to apply the Supreme Court's seizure standard. In *Jacobsen*, Federal Express employees noticed a white powdery substance inside a damaged package, which prompted the employees to contact the Drug Enforcement Administration (DEA). When a DEA agent arrived and was told about the white powdery substance, he opened the damaged package, removed four plastic bags from a tube inside the package, removed traces of the white substance from the plastic bags, and field tested the white substance. The field tests revealed the white substance was cocaine. Other DEA agents also field tested the white substance. When determining whether the agents unlawfully seized and searched the package, the Court concluded the DEA "agents' assertion of dominion and control over the package

and its contents did constitute a 'seizure.' " *Id.* at 120, 104 S.Ct. 1652. After recognizing "the Magistrate and the District Court found that the agents took custody of the package from Federal Express after they arrived" even though the package's owners "had entrusted possession of the items to Federal Express," the Court held "the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a 'seizure.' " *Id.* n. 18, 104 S.Ct. 1652. Notwithstanding the Court's seizure decision, the Court concluded the seizure was not unreasonable because the agents had probable cause to believe the package contained contraband. *Id.* at 121-22, 104 S.Ct. 1652.

We do not believe the Court meant to express two different standards-i.e., meaningful interference with a person's possessory interests and dominion and control-when instructing courts how to apply Fourth Amendment seizure principles. Instead, we believe the Court referenced dominion and control when applying the seizure standard. That is, we believe the Court concluded law enforcement's exertion of dominion and control over the package for its own purposes-and in contravention to Federal Express's custody of the package-constituted a seizure under the Fourth Amendment because it constituted some meaningful interference with a person's possessory interests. Thus, the seizure standard prohibits the government's conversion of an individual's private property, as opposed to the mere technical trespass to an individual's private property. *See, e.g., United States v. Karo,* 468 U.S. 705, 712-13, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) (explaining the existence of a mere technical physical trespass to an individual's property "is only marginally relevant to the question of whether the Fourth Amendment has been violated," as "[a] 'seizure' of property occurs when 'there is some meaningful interference with an individual's possessory interests in that property' ") (quoting *Jacobsen,* 466 U.S. at 113, 104 S.Ct. 1652); *Jacobsen,* 466 U.S. at 124-25, 104 S.Ct. 1652 (stating "the field test [of the white substance] did affect

respondents' possessory interests protected by the [Fourth] Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation of possessory interests into a permanent one"); W. Page Keeton, et al., *Prosser and Keeton on The Law of Torts* § 15 at 92, 102 (5th ed.1984) (recognizing the tort of conversion differs from the tort of trespass in that conversion requires "an intent to exercise a dominion or control over the goods which is in fact inconsistent with the [owner]'s rights," and noting "[t]he gist of conversion is the interference with control of the [owner's] property"). Because we do not believe *Jacobsen* enunciated separate standards for seizure cases, we will not concern ourselves with trying to apply "both" standards. Instead, we will focus on whether the NSP's conduct constituted some meaningful interference with Va Lerie's possessory interests in his checked luggage.

Armed with the Supreme Court's enunciation of Fourth Amendment seizure principles, we ask whether law enforcement's removal of a commercial bus passenger's checked luggage from the bus's lower luggage compartment to a room inside the bus terminal to seek the passenger's consent to search the luggage constitutes some meaningful interference with the passenger's possessory interests in his luggage.

Seizure issues involving checked luggage are hardly new for circuit courts. A number of circuit court decisions addressing seizure issues similar to this case support our holding the NSP did not seize Va Lerie's checked luggage, because the removal of the luggage did not delay his travel or significantly impact his freedom of movement, affect the timely delivery of the checked luggage, or deprive Greyhound of its custody of the checked luggage. Nearly two decades ago, the Fifth Circuit confronted a similar case. In *United States v. Lovell,* 849 F.2d 910 (5th Cir.1988), border patrol agents saw a nervous airline passenger check his luggage. The agents then went to the airline baggage area, removed the passenger's checked luggage

from the baggage conveyor belt, and compressed the sides of the luggage several times. When compressing the sides of the luggage, the agents smelled marijuana. The agents then subjected the detained luggage to a drug-sniffing dog, which alerted to the luggage. Based on this information, the agents obtained a search warrant, searched the luggage, and discovered sixty-eight pounds of marijuana. *Id.* at 911. After being charged with possession with intent to distribute, the defendant moved to suppress the marijuana, claiming "the agents' removal of his luggage from the conveyor belt and their manipulation and sniff of that luggage constituted a seizure and search within the meaning of the fourth amendment." *Id.* at 912. The district court denied the motion to suppress, and the Fifth Circuit affirmed, holding the agents did not seize the defendant's luggage. *Id.* at 916.

In considering whether the agents' conduct constituted some meaningful interference with the defendant's possessory interests in his checked luggage, i.e., whether a seizure had occurred, the Fifth Circuit focused on the defendant's freedom of movement and his expectation of timely delivery of his checked luggage. *See id.* The court quoted *Jacobsen* and distinguished *Place*, noting the defendant "had surrendered his bags to a third-party common carrier with the expectation that the carrier would transport the bags to [the defendant]'s destination for him to reclaim when he arrived" and the defendant's travel would not "have been interfered with or his expectations with respect to his luggage frustrated" had the agents not smelled marijuana. *Id.* Thus, the court held "[t]he momentary delay occasioned by the bags' removal from the conveyor belt was insufficient to constitute a meaningful interference with [the defendant]'s possessory interest in his bags." *Id.*

The Ninth Circuit later adopted the Fifth Circuit's approach in *Lovell* in a case similar to the one we confront today. In *United States v. Brown*, 884 F.2d 1309 (9th Cir.1989), the

defendant, who appeared to be nervous, checked his new luggage after paying cash for a one-way airline ticket. Based on this information, law enforcement agents had the defendant's checked luggage "held." *Id.* at 1310. The agents then asked the defendant if they could speak with him, informed him he was not under arrest and that he was free to leave, and asked if they could search his carry-on luggage as well as his checked luggage. The defendant consented to a search of both his carry-on and checked luggage. Because the checked luggage was locked, the agents asked the defendant for the keys to the luggage. Even though the defendant claimed he did not have the keys to the luggage, he produced a set of luggage keys. When the defendant refused to accompany the agents when they took the keys to try them on the checked luggage, the agents handcuffed the defendant pending the search. The search of the checked luggage produced two kilograms of cocaine. *Id.* at 1310-11. The defendant moved to suppress the cocaine, contending the detectives violated the Fourth Amendment by stopping him and holding his checked luggage.

After holding the agents' initial contact with the defendant did not constitute a seizure, the court addressed an issue of first impression for that circuit: "whether the brief diversion of [the defendant]'s suitcases from their journey to the cargo hold was a seizure," i.e., whether the detention of the defendant's checked luggage was a meaningful interference with the defendant's possessory interest in his luggage. *Id.* at 1311. The court first acknowledged the *Place* distinction the Fifth Circuit drew in *Lovell* "between taking property from a traveler's custody and merely detaining bags which the traveler has already relinquished to a third-party common carrier." *Id.* The court then noted that, had the defendant not consented to a search of his luggage, "the brief detention of [the defendant]'s bags would have in no way interfered with his travel or frustrated his expectations with respect to his luggage." *Id.* Thus, the court held the agents' detention of the defendant's luggage in the cargo hold area of the terminal did not constitute

a Fourth Amendment seizure.[5] *Id.*

A few years after *Brown,* the Ninth Circuit again addressed a seizure case in the context of checked luggage. In *United States v. Johnson,* 990 F.2d 1129 (9th Cir.1993), an airline passenger, who purchased a one-way ticket with cash, checked in late such that his checked luggage could not be placed on the same flight, but was scheduled to be placed on the next flight leaving two hours after the passenger's flight. Without interfering with the passenger in any way, law enforcement officers received permission from the airline to go onto the tarmac to investigate the checked luggage. When the officers asked an airline representative if they could take the luggage inside the terminal, the airline representative allowed the officers to take the luggage to an airline office inside the terminal, "but refused to relinquish custody of the luggage to the Drug Enforcement Agency (DEA) office at the airport." *Id.* at 1130. The airline representative later "allowed the officers, with the airline representative present, to take the luggage to the DEA office" inside the airport. *Id.* at 1130-31. However, "[t]he airline maintained custody of the luggage at all times." *Id.* at 1131. After the luggage was taken to the DEA office, a drug-sniffing dog was called to the scene, at which time the luggage was taken into a hallway for the dog-sniff. When the dog alerted to the luggage, the officers seized the bags, obtained a search warrant, searched the luggage, and discovered 2.9 kilograms of cocaine base. Applying *Brown,* the Ninth Circuit held no Fourth Amendment seizure occurred before the dog sniff. *Id.* at 1132-33. The court explained its rationale for determining no seizure occurred:

> Here [the passenger]'s only interest was that the airline, as his bailee, would place his luggage on the next plane, which was to leave about two hours after his plane. The entire process of removing the luggage from the cart, taking it

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[5]We note the court also held "[t]he district court properly found [the defendant] consented to the search" of his luggage. *Id.* at 1311-12.

> from one office to the other, and having the dog sniff it, was completed prior to the time the luggage would have been placed on the airplane. The airline did not give up custody of the luggage to the narcotics officers until after the dog had indicated the presence of narcotics.... Because nothing that the officers did interfered with the [passenger]'s possessory interests in his luggage prior to the dog sniffing, there was no seizure of the luggage.

Id. at 1132.

The Seventh Circuit specifically has considered the consequences of police interference with luggage checked with Greyhound. In *United States v. Ward,* 144 F.3d 1024 (7th Cir.1998), the defendant in Los Angeles checked his luggage with Greyhound, which placed the luggage in the bus's luggage compartment accessible only from the outside. The defendant did not board the bus, but instead flew to the bus's destination in Indianapolis to await the bus and claim his luggage. When the bus stopped for a passenger meal break in Springfield, Missouri, drug enforcement officers looked inside the luggage compartment and noticed a suspicious piece of luggage. When no passenger claimed ownership of the suspicious piece of luggage, an officer removed the luggage to subject it to a dog-sniff. After the bus left the station, the officers subjected the detained luggage to the dog-sniff, and the dog alerted to the luggage. Once a search warrant was obtained, an officer searched the luggage and discovered a kilogram of cocaine and a semi-automatic handgun loaded with hollow-point bullets. Officers later apprehended the defendant as he attempted to claim his luggage in Indianapolis. *Id.* at 1028.

Confronted with the question of whether the drug enforcement officers violated the Fourth Amendment by removing the checked luggage from the bus's luggage compartment, the Seventh Circuit focused on the defendant's possessory interests in his luggage. *Id.* at 1030-34. Initially, the court noted the defendant "had no cognizable interest in

repossessing his bag until the bus arrived" at its destination. *Id.* at 1031. The court explained that the defendant, by "surrender[ing] custody of the bag to Greyhound ... could reasonably have foreseen that the bag would be handled, moved around, and even taken off the bus, whether at intermediate stops when the driver might need to remove the bag to sort and/or gain access to other luggage, or at a hub like St. Louis where the bag would have been transferred to another bus." *Id.* at 1032. The court concluded the defendant "could have no reasonable expectation, in other words, that the bag would not be touched, handled, or even removed from the bus prior to the bag's arrival" at its destination. *Id.* Because the defendant had few possessory interests in his checked luggage, and because he should have expected his luggage would have been handled by strangers, the court held the officers "did not 'seize' [the defendant]'s bag merely by touching and then removing it from the luggage compartment. Handling the bag to that limited extent did not impinge on any of the rights that the Fourth Amendment protects." *Id.* at 1033. Focusing on the defendant's expectations of timely regaining possession of his luggage from Greyhound, the court noted the officers' interference with the luggage would have constituted a seizure only when it "interrupted the bag's transport" and "interfer[ed] with [the defendant]'s contractually-based expectation that he would regain possession of the bag at a particular time."[6] *Id.*

In reviewing the Supreme Court's enunciation of Fourth Amendment seizure principles, as well as the approaches taken by the Fifth, Seventh and Ninth Circuits in applying Fourth Amendment seizure principles to checked luggage cases, we make a few observations of our own. Because seizure is defined as some meaningful interference with an individual's

[6]The Seventh Circuit also recognized the critical difference between removing luggage from a passenger's immediate possession and removing luggage checked with Greyhound and placed in a luggage compartment with other luggage. *See id.* at 1032 (citing and distinguishing *Place*, 462 U.S. at 708-09, 103 S.Ct. 2637).

possessory interests in his property, not all police interference with an individual's property constitutes a Fourth Amendment seizure, i.e., the police do not seize property every time they handle private property. By requiring some *meaningful interference* with an individual's possessory interests in property, the Supreme Court inevitably contemplated excluding *inconsequential interference* with an individual's possessory interests. We also readily recognize the Supreme Court instructed courts to consider an individual's possessory interests in his property in determining whether a seizure has occurred.

Applying the Supreme Court's definition of seizure with an eye toward the applications provided by the Fifth, Seventh and Ninth Circuits over the past seventeen years, we glean a number of principles that relate to checked luggage cases. First, the Fourth Amendment's Seizure Clause prohibits the government from restraining an individual's freedom of movement. Thus, if law enforcement's detention of checked luggage delays a passenger's travel or significantly impacts the passenger's freedom of movement, the Seizure Clause is implicated. Second, a commercial bus passenger has less possessory interest in checked luggage than he has in carry-on luggage in his immediate possession. To be certain, a passenger gives up his immediate possessory interest when he checks his luggage with the commercial carrier as bailee. At a minimum, the passenger's possessory interests in his checked luggage entail the right (or at least the expectation) to regain custody, i.e., reclaim immediate possession of the checked luggage at the passenger's or the luggage's destination. Finally, a commercial bus passenger who checks his luggage should reasonably expect his luggage to endure a fair amount of handling-if his luggage were not handled, it would not reach its destination. For instance, a commercial bus passenger's checked luggage must be sorted, loaded, rearranged, possibly transferred to another bus, and unloaded. The luggage may be damaged and require removal from the luggage compartment. If a bus breaks down, a passenger should expect his luggage to be removed from the

luggage compartment and either transferred to another bus or taken inside the bus terminal. As long as law enforcement officers do not deprive the commercial carrier of its custody of the checked luggage, no meaningful interference with the passenger's checked luggage occurs.

Boiling these principles down, we believe courts must focus on three factors when considering whether law enforcement's interference with checked luggage constitutes a seizure. First, did law enforcement's detention of the checked luggage delay a passenger's travel or significantly impact the passenger's freedom of movement? Second, did law enforcement's detention of the checked luggage delay its timely delivery? Third, did law enforcement's detention of the checked luggage deprive the carrier of its custody of the checked luggage?[7] If none of these factors is satisfied, then no Fourth Amendment seizure has occurred. Conversely, if even a single factor is satisfied, then a Fourth Amendment seizure has occurred.

Our holding is consistent with the holdings of other courts that have confronted seizure issues involving checked luggage. *See, e.g., State v. Peters,* 189 Ariz. 216, 941 P.2d 228, 232 (Ariz.1997) (en banc) (holding the "warrantless detention [of checked luggage at an airport] for examination without reasonable suspicion is not a seizure and is permissible if made in such a manner that neither the traveler nor his luggage is unreasonably delayed")[8]; *State v. Goodley,* 381 So.2d 1180,

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[7]To test the breadth of the carrier's custodial rights, we ask whether the government's actions go beyond the scope of the passenger's reasonable expectations for how the passenger's luggage might be handled when in the carrier's custody. *See, e.g., Ward,* 144 F.3d at 1032.

[8]Citing "modern conditions," the Arizona Supreme Court stated, "Today police, airport security personnel, and travelers must all be concerned not only that drugs may be transported but that explosives, incendiary devices, and other items that threaten the safety of those on the airplane may be stored in luggage in the airplane's baggage compartment. Travelers today expect and want luggage X-rayed, sniffed, felt, and handled in a manner that is as non-intrusive as possible but consistent with ensuring that the checked luggage does not contain items that threaten their safety. Brief, non-intrusive

1182 (Fla.Dist.Ct.App.1980) ("It is obvious that [an airline] traveler who checks his luggage has no knowledge and, in fact, no real concern as to precisely where his bag may be located within the airline's custody at any given time. It follows that the slight movement [by law enforcement] of [the defendant]'s unopened bag from the [baggage] cart to the floor [about a foot away so a drug dog could conduct a sniff search] ... did not, even remotely, amount to a fourth amendment seizure ...."); *cf. United States v. Gant*, 112 F.3d 239, 240, 242 (6th Cir.1997) (holding police officers' removal of luggage from an overhead compartment of a Greyhound bus to subject the luggage to a drug-sniffing dog did not constitute a seizure under the Fourth Amendment).

Our holding also comports with the views expressed by many judges in this circuit. *See, e.g., Va Lerie*, 385 F.3d at 1150 (Melloy, J., concurring) (opining "that a brief detention of a piece of luggage that does not result in the delay of either the passenger, or ultimate delivery of the luggage, is not a seizure"); *Gomez*, 312 F.3d at 923-24 (Bowman, J., with Hansen and Bye, JJ.) (holding no seizure occurred when a drug interdiction officer at a post office moved a package to a command center twenty yards from a conveyor belt in a sorting area); *Demoss*, 279 F.3d at 640 (Hansen, J., concurring) (choosing "to cast my lot with those cases both from this and other circuits indicating that a piece of luggage ... delivered to a common carrier is not 'seized' within the meaning of the Fourth Amendment until the authorities have interfered with a possessory interest in the luggage ... such that the expectation of timely delivery of the ... luggage has been frustrated"); *Vasquez*, 213 F.3d at 426 (Fagg, J., with Wollman and Murphy, JJ.) (holding no seizure occurred when drug interdiction officers at a Federal Express facility subjected a package to a

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detention of checked luggage for such examination no longer invades the traveler's reasonable expectation of privacy, does not unduly interfere with possessory rights, and is not a seizure under the Fourth Amendment." *Id.* at 231.

drug-sniffing dog); *Riley,* 927 F.2d at 1048 n. 4 (Gibson, John R., J., with Magill and Beam, JJ.) (implying no seizure occurred when police subjected an airline passenger's checked luggage to a drug-sniffing dog); *cf. Harvey,* 961 F.2d at 1363-64 (per curiam with Wollman and Hansen, JJ., and Lay, J., dissenting) (holding police officers' removal of luggage from a bus's overhead luggage compartment to subject the luggage to a drug-sniffing dog during a refueling stop did not constitute a Fourth Amendment seizure).

Having announced what we hope are manageable factors to consider when confronted with seizure cases involving checked luggage, we now apply those factors to this case. First, the NSP's brief and temporary removal of Va Lerie's checked luggage from the luggage compartment to ask Va Lerie to consent to a search did not delay Va Lerie's travel or impact his freedom of movement. Va Lerie's travel was delayed, and his freedom of movement impacted, only after the NSP searched the luggage and discovered a large amount of illegal drugs. Second, the NSP's removal of Va Lerie's checked luggage from the bus did not affect the timely delivery of the luggage. No evidence suggests the luggage would not have been placed back on the bus for transport to its destination had it not been for the discovery of illegal drugs. Finally, Va Lerie's possessory interests in his checked luggage certainly included an expectation that Greyhound-or others at Greyhound's request-would remove the luggage from the lower luggage compartment. The NSP would have preferred to bring Va Lerie to the bus in the refueling area to seek permission to search, but Greyhound asked the NSP not to bring passengers to that area. Thus, the NSP removed Va Lerie's checked luggage from the lower luggage compartment to a room inside the terminal at Greyhound's request. In doing so, the NSP never deprived Greyhound of its custody of Va Lerie's checked luggage.[9] We

[9]Had the NSP exerted dominion and control over Va Lerie's luggage such that it deprived Greyhound of its custody of the luggage, then a seizure

conclude the NSP's removal of Va Lerie's checked luggage from the bus to a room inside the terminal to seek consent to search did not constitute a meaningful interference with Va Lerie's possessory interests in his luggage. Therefore, no Fourth Amendment seizure occurred.[10]

C. Consent to Search

Contingent upon our reversal of the district court's seizure decision, the government asks us to reverse the district court's finding Va Lerie did not voluntarily consent to the search of his luggage. Because we reverse the district court on the seizure issue, we must examine the district court's consent decision. If Va Lerie voluntarily consented to the search of his luggage, then no Fourth Amendment violation occurred in this case. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Brown,* 345 F.3d 574, 579 (8th Cir.2003).

In determining whether Va Lerie voluntarily consented to a search of his luggage, we must consider the totality of the

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would have occurred. That is what happened in *Jacobsen.* Federal Express employees notified the DEA that a damaged package contained a white powdery substance. When the DEA agents arrived to search the package and test the white powdery substance, they took custody of the package by exerting dominion and control over it for their own purposes, i.e., they converted the package. The DEA agents were not going to return the package to Federal Express until after the agents searched the package and tested the white powdery substance. Here, the NSP never deprived Greyhound of custody of the checked luggage, at least not until Va Lerie consented to a search that unveiled cocaine. Indeed, the NSP adopted the policy of removing the luggage from the bus to present to the owner to seek consent to search at Greyhound's prompting. We see little, if any, distinction between the NSP's removal of the luggage to present it to Va Lerie to seek consent to search and the NSP simply asking Va Lerie to consent to a search.

[10]The Fourth Amendment prohibits unreasonable seizures. Because the government does not argue the NSP's conduct was reasonable and because we hold the removal of the luggage from the bus to seek Va Lerie's consent to search did not constitute a seizure, we do not address the reasonableness of the NSP's conduct.

circumstances surrounding the alleged consent, paying particular attention to the following factors:

> personal characteristics of the defendant, such as age, education, intelligence, sobriety, and experience with the law; and features of the context in which the consent was given, such as the length of detention or questioning, the substance of any discussion between the defendant and police preceding the consent, whether the defendant was free to leave or was subject to restraint, and whether the defendant's contemporaneous reaction to the search was consistent with consent.

United States v. Jones, 254 F.3d 692, 696 (8th Cir.2001). After listening to the testimony of Investigator Eberle and Va Lerie, as well as viewing their actual testimony to make credibility determinations, the magistrate judge found Va Lerie voluntarily consented to the search of his luggage. Without the benefit of viewing Investigator Eberle and Va Lerie as they testified, the district court conducted a de novo review of the record. After reviewing the record, the district court rejected the magistrate judge's recommended finding that Va Lerie voluntarily consented to the search of his luggage.

Based on our review of the record and the district court's findings, we conclude the district court erred in rejecting the magistrate judge's recommended finding that Va Lerie voluntarily consented to the search of his luggage. The following factual findings strongly support a finding Va Lerie voluntarily consented to the search: (1) Va Lerie is 37 years old, has three years of college education, and enjoys normal intelligence; (2) Va Lerie voluntarily responded to Investigator Eberle's page; (3) Investigator Eberle displayed his badge, explained he was a narcotics officer, informed Va Lerie he was not in trouble or under arrest, and asked Va Lerie to follow him to the rear baggage terminal; (4) Va Lerie acquiesced in Investigator Eberle's request to accompany him to a room with two open doors in the rear baggage terminal where one or two

other officers were waiting with Va Lerie's luggage; (5) Investigator Eberle asked Va Lerie for consent to search his luggage; (6) Va Lerie verbally consented to the search, according to Investigator Eberle; (7) Va Lerie understood Investigator Eberle's questions; (8) Va Lerie was sober and not impaired; (9) Va Lerie's "own testimony indicates that he did not object to the search"; (10) Investigator Eberle was not in uniform and did not display his weapon; and (11) no law enforcement officer threatened or coerced Va Lerie.

The only findings the district court mentioned to support its no-consent decision were (1) the district court's statement "there is no reason to believe [Va Lerie] or anyone else-even most lawyers-would know that they could refuse the request to search the bag"; (2) the officers did not give Va Lerie any *Miranda* warnings; (3) Va Lerie "was alone, in a private room, with at least two armed police officers"; and (4) the officers already had Va Lerie's luggage when they asked for consent to search it.

Given the numerous facts supporting a finding of voluntary consent, we reject the district court's finding that Va Lerie did not voluntarily consent to the search of his luggage. First, the district court surmised anyone, including attorneys, would not have known they had the right to refuse to consent to the search of the luggage, and noted the officers failed to give Va Lerie any *Miranda* warnings. The Supreme "Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." *United States v. Drayton*, 536 U.S. 194, 206, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002). Although Investigator Eberle did not specifically warn Va Lerie of the pitfalls of consenting to a search of his luggage containing five vacuum-sealed packages of cocaine, Investigator Eberle did seek permission to search the luggage, which implied Va Leric could refuse permission and, therefore, supports a finding of voluntary consent. *See id.* at 207, 122

S.Ct. 2105. We also recognize the record does not suggest Va Lerie did not know he had the right to refuse to search; instead, the record reflects Va Lerie expressly consented to the search and never objected to the search.[11]

Second, we are not persuaded that two or three officers being armed with holstered firearms in a private room inside a bus terminal negates Va Lerie's consent. *Id.* at 205, 122 S.Ct. 2105 ("That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."). Taken in context with the totality of the circumstances, these findings do not overcome the district court's other findings, both explicit and implicit, that "[t]here was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice." *Id.* at 204, 122 S.Ct. 2105.

Finally, we give little weight in this case to the officers' presenting Va Lerie's checked luggage to him when requesting permission to search, because this evidence does not transform the consensual encounter between the NSP and a bus passenger into a coercive encounter. Given our holding that the NSP was not constitutionally forbidden to remove the checked luggage from the bus to present the luggage to Va Lerie to seek consent to search, we would be hard-pressed to conclude such a presentation would be any different than simply asking Va Lerie

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[11] If the district court's unsubstantiated observation that most lawyers do not know the police have no right to search luggage without probable cause or consent is correct, we would be sadly disappointed. The Supreme Court teaches, "In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion." *Id.*

for permission to search his checked luggage. *See, e.g., Brown,* 884 F.2d at 1311-12 (holding airline passenger voluntarily consented to a search of his checked luggage).

Accordingly, we reverse the district court's erroneous consent determination, because Va Lerie's consent to search his luggage was voluntary.

III. CONCLUSION

For the foregoing reasons, we reverse the district court's decision granting Va Lerie's motion to suppress, vacate the court's suppression order, and remand for further proceedings consistent with this opinion.

WOLLMAN, Circuit Judge, concurring.

With the exception of footnotes 8, 9, and 11, which I view as unnecessary to the resolution of the issues before us, I concur in the court's opinion.

COLLOTON, Circuit Judge, with whom McMILLIAN, MORRIS SHEPPARD ARNOLD, BYE and SMITH, Circuit Judges, join, dissenting.

I believe the court's holding conflicts with the Supreme Court's decision in *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). I therefore respectfully dissent.

The question presented in this appeal is whether Nebraska State Police investigators effected a "seizure" of Keith Va Lerie's luggage, within the meaning of the Fourth Amendment, when they took physical possession of his garment bag and carried it from the Greyhound bus on which Va Lerie was traveling to a room in the bus terminal, for the purpose of summoning Va Lerie and seeking his consent to search the bag as part of their investigation of suspected drug trafficking. Although the magistrate judge recommended denying Va Lerie's motion to suppress on the ground that investigators had "reasonable suspicion" to seize the bag, the government has

abandoned that argument on appeal, and does not otherwise argue that a seizure of the luggage was "reasonable." *See* Brief of Appellant at 5 ("[T]he United States does *not* advance the proposition that there was reasonable suspicion to remove the garment bag from the area where the bus was being refueled to the office in the bus terminal itself. Rather, the United States argues that that activity does not constitute a seizure for constitutional purposes.") (emphasis in original); *cf. United States v. Van Leeuwen*, 397 U.S. 249, 252-53, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970). Nor does the government contend that Va Lerie's alleged consent to search the luggage was an independent act of free will that purged the taint of any unconstitutional seizure. *See United States v. Va Lerie*, 385 F.3d 1141, 1149-50 (8th Cir.2004); *id.* at 1150 (Melloy, J., concurring) ("The government made the tactical decision to challenge the district court decision solely on the grounds that the district court was wrong in its ruling that a seizure occurred."). The critical question before us, therefore, is whether the luggage was "seized," and *Jacobsen* dictates that the answer is yes.

Jacobsen involved a Federal Express package en route to the residence of Bradley and Donna Jacobsen in Apple Valley, Minnesota. *See United States v. Jacobsen*, 683 F.2d 296, 297-98 (8th Cir.1982). The package was damaged by a forklift at the Minneapolis-St. Paul airport Federal Express office, prompting Federal Express employees to examine the contents. When they discovered a white powder inside the package, Federal Express personnel notified the Drug Enforcement Administration, and agents traveled to the airport to investigate. Federal Express employees invited an agent to examine the contents of the package, 466 U.S. at 119, 121, 104 S.Ct. 1652, and after the box was placed on a desk in the Federal Express office, the agent proceeded to reopen the package and conduct a "field test" on the white powder. *Id.* at 111-12, 104 S.Ct. 1652.

In discussing whether the DEA agents made an initial "seizure" of the package before conducting the field test, the Court first made the general statement that "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id.* at 113, 104 S.Ct. 1652. In applying that standard to the facts of *Jacobsen,* the Court concluded that "the agents' assertion of dominion and control over the package and its contents did constitute a 'seizure.' " *Id.* at 120, 104 S.Ct. 1652. The Court explained that although the Jacobsens "entrusted possession of the items to Federal Express, the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a 'seizure,' though not necessarily an unreasonable one." *Id.* at 120 n. 18, 104 S.Ct. 1652. This holding is consistent with the Court's later observation that "[f]rom the time of the founding to the present, the word 'seizure' has meant a 'taking possession,' " and that "[f]or most purposes at common law, the word connoted ... bringing [an object] within physical control." *California v. Hodari D.,* 499 U.S. 621, 624, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (internal citations omitted).

There is no viable distinction between this case and *Jacobsen* on the question whether governmental authorities effected a seizure. Although Va Lerie entrusted possession of his luggage to Greyhound, NSP investigators exerted dominion and control over the luggage for their own purposes. That is, they identified the luggage for investigation, took physical possession and control of the garment bag at the bus, and moved it to a non-public room in the bus station, where three or four investigators were present. *United States v. Va Lerie,* No. 8:03CR23, 2003 WL 21956437, at *1, 4 (D.Neb. Aug.14, 2003); *United States v. Valerie,* 2003 WL 21953948, at *1 (D.Neb. June 10, 2003) (report and recommendation). They did so for the purpose of furthering their law enforcement investigation of potential drug trafficking by summoning Va Lerie and seeking his consent to search the luggage. *Valerie,*

2003 WL 21956437, at *1. According to *Jacobsen*, therefore, this action by the NSP investigators constituted a seizure. 466 U.S. at 120 n. 18, 104 S.Ct. 1652.

Jacobsen cannot be distinguished on the ground that the DEA agents destroyed a quantity of the white powder in the Federal Express package by conducting a field test. *Cf. ante*, at 13 (citing *Jacobsen*, 466 U.S. at 124-25, 104 S.Ct. 1652, for the proposition that "the field test did affect respondents' possessory interests"). The Court was clear that an "initial 'seizure' " involving a "temporary deprivation of possessory interests," 466 U.S. at 124-25, 104 S.Ct. 1652, took place when agents made "the decision ... to exert dominion and control over the package for their own purposes," *id.* at 120 n. 18, 104 S.Ct. 1652, not when an agent destroyed some of the powder. The Court separately analyzed the significance of the field test, concluding that it reasonably "converted what had been only a temporary deprivation of possessory interests into a permanent one." *Id.* at 124-25, 104 S.Ct. 1652. Nor did the occurrence of the initial seizure in *Jacobsen* depend on the fact that agents intended "to search the package." *Cf. ante*, at 22 n. 9. *Jacobsen* did not involve a Fourth Amendment "search" at all, 466 U.S. at 120, 124, 104 S.Ct. 1652, and the Court subsequently relied on *Jacobsen* when it held unanimously that "seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." *Soldal v. Cook County*, 506 U.S. 56, 68, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992).

Under the test applied by the court today, the initial seizure in *Jacobsen* would not be a seizure. First, the initial seizure of the Federal Express package of course did not delay any travel by the Jacobsens or impact their freedom of movement. Second, there is no reason to believe the "temporary deprivation" occasioned by the "decision ... to exert dominion and control over the package" delayed the delivery of the Jacobsens' package, and the Court in no way relied on potential

delay in announcing its conclusion. In fact, after only a "short time" at the Federal Express office (including further investigation beyond the initial seizure), the package was "rewrapped and Federal Express was directed to deliver the package to the addressee shown on the label." 683 F.2d at 297; *see also* 466 U.S. at 111-12, 104 S.Ct. 1652.

And third, if law enforcement's physical possession and control of Va Lerie's luggage--in a room inside the bus terminal without Greyhound personnel present--did not temporarily deprive Greyhound of its custody of the luggage, then neither did the DEA's possession of the Federal Express package in *Jacobsen* deprive the courier of its custody of the package. The majority says the NSP "never deprived Greyhound of its custody" of the garment bag, because "NSP removed Va Lerie's checked luggage from the lower luggage compartment to a room inside the terminal at Greyhound's request." *Ante,* at 22. By that reasoning, Federal Express surely was not "deprived of custody" when the Jacobsens' package was "placed on a desk" in the Federal Express office, 466 U.S. at 111, 104 S.Ct. 1652, and examined by a DEA agent, after Federal Express employees "invited the federal agent to their offices for the express purpose of viewing" the contents of the package. *Id.* at 119, 104 S.Ct. 1652.[12] And if the NSP did not exceed Va Lerie's

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[12]The better view, in my judgment, is that the DEA agents in *Jacobsen* and the NSP investigators in this case took "custody" of the package and luggage, respectively, when they took physical possession and control of the containers for the purpose of investigating their contents. *See Black's Law Dictionary* 390 (7th ed.1999) (defining "custody" as "the care and control of a thing ... for inspection, preservation, or security"); *ante,* at 19 (equating "custody" with "immediate possession"). The subjective belief or assertion of an NSP investigator that Va Lerie's bag "was not in our custody," *ante,* at 3, certainly is not dispositive, and the district court made no finding that the investigators' physical possession and control of the luggage for investigative purposes did not amount to "custody" of the luggage. Rather, the district court found that the NSP investigators "removed," "detained," "seized," "sequestered," and exerted "thorough 'dominion and control' " over the garment bag. *Va Lerie,* 2003 WL 21956437, at * 2, 4, 8. *Cf.*

"reasonable expectations for how the passenger's luggage might be handled," *ante,* at 20 n. 7, (despite no apparent evidence that Greyhound itself typically moved checked luggage from the bus to rooms inside the terminal during intermediate stops), then the DEA agents who effected the "initial seizure" of the Jacobsens' package (prior to the field test) certainly did not exceed reasonable expectations about handling of the package by the private carrier when they merely replicated what Federal Express itself already had done. 466 U.S. at 119-20, 104 S.Ct. 1652. Thus, the court's three-factor test, as applied, conflicts with *Jacobsen.*

Although the court asserts that its new test comports with the views of many judges in this circuit, *ante,* at 21-22, none of our prior holdings dictates the conclusion reached today.[13] To be sure, our court has recognized that not *every* interference with a person's property constitutes a "seizure" under the Fourth Amendment, because some interferences are not "meaningful." *E.g., United States v. Gomez,* 312 F.3d at 923. But in arriving at its holding, the court is forced to overrule or distinguish without explanation several decisions--rendered by some of the same judges cited by the majority-- recognizing that

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Jacobsen, 466 U.S. at 120 n. 18, 104 S.Ct. 1652 (noting district court found that agents "took custody" of package, and holding that exertion of "dominion and control" over package constituted a seizure). In any event, under either approach to the issue of "custody," there is no perceptible distinction between this case and *Jacobsen.*

[13]The only holdings said to be on point are *United States v. Gomez,* 312 F.3d 920, 923-24 (8th Cir.2002), and *United States v. Vasquez,* 213 F.3d 425, 426 (8th Cir.2000). *Gomez* itself, however, stated that a seizure *does* occur when, as here, an officer exerts dominion and control over an object "by deciding to go beyond a superficial inspection of the exterior of the packages and to detain the packages for further inquiry into characteristics that could not be observed by merely holding the package." 312 F.3d at 923 n. 2 (citing *Jacobsen,* 466 U.S. at 121 n. 18, 104 S.Ct. 1652). *Vasquez* is distinguishable, because it held that there was no seizure where officers *did not* take possession of packages at a sorting station, but merely brought a narcotics dog to sniff the packages as a Federal Express driver "continued to load the accumulated parcels unimpeded." 213 F.3d at 426.

law enforcement's exercise of dominion and control over an object entrusted to a bailee, for the purpose of conducting investigation beyond an observation of the object's exterior, does constitute a "seizure" under *Jacobsen*. *See ante*, at 9 n. 3.

Most recently, in *United States v. Morones*, 355 F.3d 1108 (8th Cir.2004), we held that a deputy's removal of a FedEx package from an outbound conveyor belt for the purpose of subjecting the package to a canine sniff was a "meaningful interference" with "possessory interests" under *Jacobsen*, despite the government's assertion that no evidence showed that the brief detention of the package would have delayed its delivery. *Id.* at 1111. This holding followed ineluctably from *Jacobsen*, which even analogized the field test for which the package was detained to a "sniff test" by a trained narcotics dog. 466 U.S. at 123-24, 104 S.Ct. 1652. We previously reached the same conclusion in at least two other cases. *United States v. Walker*, 324 F.3d 1032, 1036 (8th Cir.2003) ("It is clear under our precedent that when [the agent] moved the package to a separate room for a canine sniff, the package was seized for Fourth Amendment purposes."); *United States v. Demoss*, 279 F.3d 632, 636 (8th Cir.2002) ("As Meyer moved the package away from the conveyor belt and detained the package for a canine sniff, he 'exert[ed] dominion and control over the package,' that is, the package was seized for Fourth Amendment purposes.") (citing *Jacobsen*, 466 U.S. at 121 n. 18, 104 S.Ct. 1652); *see also Gomez*, 312 F.3d at 923 n. 2; *United States v. Fuller*, 374 F.3d 617, 621 (8th Cir.2004).

The three-judge panel that first heard this case acknowledged that Va Lerie's case is indistinguishable from *Morones*, *Walker*, and *Demoss*. *Va Lerie*, 385 F.3d at 1147-48; *id.* at 1150 (McIloy, J., concurring); *see also id.* at 1151-52 (Riley, J., dissenting) (declining to follow *Morones*, *Walker*, and *Demoss*). The court today suggests no distinction. These precedents represent a faithful application of *Jacobsen*, and we

should follow them here.[14]

The Supreme Court did not regard the initial seizure in *Jacobsen* as a close question: The DEA's possession and control of the package "*clearly* constituted a 'seizure.' " 466 U.S. at 120 n. 18, 104 S.Ct. 1652 (emphasis added). This although the Jacobsens were merely intended recipients who had never actually possessed the package, the initial seizure would have occasioned no delay in delivery, and the package was examined by a government agent at the invitation of Federal Express, in the office of the private carrier, in the same manner that Federal Express previously had examined it. *Jacobsen* must be our guiding light. Absent a revision of doctrine by the Supreme Court, the NSP investigators effected a "seizure" of Va Lerie's bag, and the order of the district court should be affirmed.

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[14]The four decisions from other circuits cited by the court do not provide persuasive support for the conclusion that there was no seizure of Va Lerie's luggage under the rule of *Jacobsen*. None of the cited opinions even discussed the Supreme Court's analysis of the initial seizure in *Jacobsen*. In the Ninth Circuit decisions, moreover, the private airlines--unlike Greyhound here--did not give up possession and control of the passenger's property until after a dog had indicated the presence of narcotics or the passenger had consented to a search. *United States v. Johnson*, 990 F.2d 1129, 1130-31 (9th Cir.1993) (explaining that an airline representative was present with officers at all times, and that the airline refused to relinquish custody of luggage to DEA); *United States v. Brown*, 884 F.2d 1309, 1310 (9th Cir.1989) (explaining that agents "arranged to have Brown's [checked] luggage held" until he granted consent). And the Seventh Circuit in *United States v. Ward*, 144 F.3d 1024 (7th Cir.1998), held only that an agent did not "seize" a bag "merely by touching it and then removing it from the luggage compartment" of a bus, and that a seizure *did* occur when the agent's decision to hold the bag for canine inspection interrupted the bag's transport. *Id.* at 1033. The court rendered no decision on a situation like Va Lerie's, where agents took possession and control of luggage for the purpose of seeking consent to search, or a case like *Morones*, where agents exerted dominion and control over a package in order to conduct a canine sniff, without delaying the transport of the package.

United States District Court,D. Nebraska.
UNITED STATES OF AMERICA, Plaintiff,
v.
Keith A. VA LERIE, Defendant.
No. 8:03CR23.

Aug. 14, 2003.

MEMORANDUM AND ORDER

BATAILLON, J.

Introduction

Before me are the objections of both the government and the defendant, Filing Nos. 20 and 22, to Magistrate Judge Thalken's report and recommendation, Filing No. 19. The defendant contends that Magistrate Judge Thalken erred in finding that 1) the seizure of the defendant's garment bag was reasonable, and 2) the defendant consented to the search of the bag. The government objects to Magistrate Judge Thalken's conclusion that the defendant's statements were involuntary and hence may not be used for impeachment purposes at trial.

I have conducted a careful de novo review of the record pursuant to 28 U.S.C. § 636(b)(1)(A) and NELR 72.3(d), including the transcript of the suppression hearing, Filing No. 17 (hereafter, TR). I find that the defendant's objections should be sustained. I also find that the government's objection should be overruled.

Background

The magistrate judge's statement of the events leading to the defendant's arrest is detailed and accurate, so I need not engage in a lengthy recitation of the facts. Briefly, on December 22, 2002, Nebraska State Patrol Investigator Eberle and other

officers were engaged in interdiction duties at the Greyhound Bus station in Omaha. As Eberle examined the luggage stowed in a compartment under a bus from Los Angeles that had stopped in Omaha for refueling, he observed a newer black garment bag with a Greyhound baggage ticket indicating that the bag had been put on the bus in Los Angeles and was headed to Washington, D.C. The baggage ticket had no phone number, nor did the bag have a handwritten name tag.

Inside the terminal, Eberle had the claim number on the baggage ticket checked on Greyhound's computer system. The name associated with the bag was "Valerie Keith." Eberle learned that a one-way ticket had been purchased on the same day of travel. These factors suggested to Eberle that the bag might contain contraband. He therefore directed NSP officers to remove the bag from the bus and to bring it inside to the rear baggage terminal. Officers then paged both "Valerie Keith" and "Keith Va Lerie" over the intercom.

The defendant came to the ticket counter. Eberle testified that he identified himself, explained to the defendant that he was not under arrest or in trouble, and asked if the defendant would speak with him. The defendant agreed to speak to Eberle and gave Eberle his identification card and ticket when Eberle asked for them. Eberle returned them, then asked the defendant to accompany him to the rear baggage terminal. The defendant followed Eberle to the room, where two or three other officers, including Omaha Police Investigator Lutter, were waiting with the garment bag.

Eberle testified that when asked, the defendant admitted that the garment bag belonged to him. Eberle told the defendant he was investigating contraband being transported on buses from Los Angeles to the East Coast and asked the defendant for consent to search the garment bag. Eberle testified that the defendant consented. Investigator Lutter then searched the garment bag and found five vacuum-sealed bags of cocaine. During the search, the defendant allegedly told Eberle that the

bag belonged to a friend.

The officers arrested the defendant. Eberle later gave the defendant his *Miranda* rights at a Nebraska State Patrol office using a Nebraska State Patrol advice of rights form. Eberle then asked the defendant to waive his rights and to allow Eberle to interview him. The defendant refused to sign the form and asked for an attorney. Eberle told the defendant he wanted to find out where and to whom the cocaine was headed so law enforcement could prepare to intercept the intended recipient. He also told the defendant that he likely would be federally prosecuted and that possible consequences would ensue. The defendant told Eberle he was concerned for his safety and still wanted an attorney. Investigator Lutter told the defendant that in his experience, no informant or cooperating witness had ever been injured as a result of cooperating. The defendant again expressed his fear of the people he was dealing with and again requested an attorney.

At the suppression hearing, the government conceded that the defendant's statements made during the interview could not be used in the case-in-chief, but asked that the statements be allowed for impeachment purposes.

Legal Analysis

A. Seizure of the Garment Bag

The magistrate judge found that the officers' removal of the defendant's garment bag to the rear baggage terminal was not unreasonable. The magistrate judge observed that while the defendant may have had "a reasonable expectation that the bag would not be turned over to police investigators and subjected to a search [ ], there is no legitimate expectation that characteristics on the outside of the bag would not be observed by law-enforcement investigators." Filing No. 19, Report and Recommendation at 6. The defendant contends that the removal of the bag was an unjustifiable seizure because 1) the defendant was not party to any understanding between interdiction officers and Greyhound that officers would remove baggage from the

refueling area before questioning passengers about the baggage, and 2) in any event, the interdiction officers did not have articulable suspicions that criminal activity was afoot.

The Fourth Amendment of the Constitution forbids the seizure of personal property absent probable cause or at least reasonable suspicion. *United States v. Place,* 462 U.S. 696, 701 (1983). A seizure of property occurs when there is some "meaningful interference with an individual's possessory interests in that property." *United States v. Jacobson,* 466 U.S. 109, 113 (1984); *United States v. Demoss,* 279 F.3d 632, 635 (8th Cir.2002). The question here, of course, is whether a seizure occurred and, if so, when.

Based on the facts before me, I can only conclude, for the reasons discussed below, that a seizure occurred when the officers removed the defendant's garment bag from the bus and took it inside the terminal. Since the officers at that point did not have probable cause, and only arguably had reasonable suspicion, the seizure was unlawful. Passengers on a bus-unlike airline passengers-still retain some expectation of privacy in their baggage that the court is required to protect. I therefore find that this seizure and the subsequent search were unconstitutional invasions of the defendant's Fourth Amendment rights.

The Eighth Circuit has ruled that travelers have "a privacy interest in the *contents* of their personalluggage that is protected by the Fourth Amendment." *United States v. Gwinn,* 191 F.3d 874, 878 (8th Cir.1999) (emphasis added) (finding that an interdiction officer's "calculated and thorough squeezing and manipulation" of the exterior of a bag on a train's overhead baggage rack was an unreasonable search). To establish a legitimate expectation of privacy, a traveler must demonstrate that he or she had a subjective expectation of privacy and that the subjective expectation of privacy is one that society is prepared to recognize as objectively reasonable.[1] *United States*

[1]Based on the national security measures introduced following the

v. Mohammed, 58 F.3d 353, 355 (8th Cir.1995).

A traveler's privacy interest in personal luggage or other personal property does not necessarily extend to the *exterior* of the pieces, however, particularly when the traveler turns over control of luggage or personal property to a third party such as a common carrier. In *Demoss,* for example, the Eighth Circuit held that an officer did not seize a Federal Express package when he briefly lifted it from an airport conveyor belt, since once a sender relinquishes possession of personal property to a third party, the sender can no longer expect that the property "would not be handled or that physical attributes would not or could not be observed," especially by law enforcement officials. *Demoss,* 279 F.2d at 635. Likewise, a traveler placing luggage or other personal property in a bus or train's overhead storage compartment shared with other passengers has a lowered expectation of privacy since "other passengers or bus employees may move it for one reason or another." *Bond v. United States,* 529 U.S. 334, 338-39 (2000). *See also Gwinn,* 191 F.3d at 878-79; *United States v. Harvey,* 961 F.2d 1361, 1364 (8th Cir.1991) (finding that removal of luggage from overhead storage compartment of bus to facilitate a canine sniff was not seizure).

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events of 9/11, air travelers can no longer have a subjective expectation of privacy in luggage or personal property. *See* Note 2, *infra.* However, national security concerns with bus and train travel are somewhat less pressing than those with air travel. Bruce Richardson, president of a think tank called United Rail Passenger Alliance, illustrated these lessened concerns. "Let's face it, if you hijack a train, what are you going to do with it? ... All you can do is force it to stop or go. There are no runaway scenarios here." Karlayne Parker, *Buses, Trains Search for Security Solutions,* Tampa Tribune, Oct. 21, 2001, 2001 WL 28746077. Because the mandatory search provisions for luggage and packages put on airplanes do not apply to trains or buses, train or bus travelers can at least argue that they have a subjective expectation of privacy in their personal property, subject to the many qualifications already imposed by Fourth Amendment case law. But whether a post-9/11 society would recognize any mass transit traveler's subjective expectation of privacy as objectively reasonable is, obviously, another matter.

But train passengers-and presumably bus passengers as well-have not yet had to surrender all subjective expectations of privacy in their personal luggage.[2] The Supreme Court recognizes that while bus passengers expect that their bags may be handled, they do not expect "that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Bond*, 529 U.S. at 338-339. "Unlike the situation with airline travel, train passengers are not routinely given advance notice that inspection of their luggage is a condition of their travel. Thus, it cannot be said that by utilizing train transport, they have impliedly consented to a subsequent search of their luggage." *Gwinn*, 191 F.3d at 874 n. 4. Consequently, a bus passenger may still expect his or her bag will not be subjected to any interference more intrusive than "a canine sniff or the incidental touching that accompanies the moving of luggage from the overhead" or the rearranging of luggage in the baggage compartment under the bus. *United States v. Winborn*, 2002 WL 1484489, *5 (D.Neb.2002). *See also United States v. Ward*, 144 F.3d 1024, 1033 (7th Cir.1998) (observing that a person who surrenders bags to Greyhound for transport in a common luggage compartment "expects a significantly greater degree of handling by strangers than would a passenger who carried a bag with her onto the bus."). Furthermore, until Congress or the Eighth Circuit decides differently, a bus passenger's subjective expectation of privacy, however limited, is one that society is prepared to recognize as reasonable.

The evidence here does not suggest that the officers

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[2]Since the terrorist attacks of September 11, 2001, the degree of privacy that airline travelers may expect in their luggage has altered radically, as any recent passenger on a commercial airline will vouch. Federal law now requires screening of "all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft." 49 U.S.C. § 44901(a). In addition, federal employees must screen all checked baggage for explosives, manually if necessary. 49 U.S.C. §§ 44901(c)-(e).

conducted the sort of "calculated and thorough" feeling and manipulation of the garment bag's exterior which the Eighth Circuit found overly intrusive in *Gwinn.* Eberle testified that he did not merely look at the bags under the bus; he said that he "move[d] them around to-you have to in order to actually look at the tags. You pick the bags up and sometimes we pull them out to look at them." TR at 32:9-11. But neither was this merely the incidental manipulation of the defendant's bag by other passengers or bus employees recognized as permissible by *Bond,* or the facilitated canine sniff of *Harvey.*[3]

Rather, by removing the defendant's bag from the bus without his knowledge or consent and carrying it inside the bus terminal to a room inaccessible to the general public or to the defendant, *see* TR at 12:19-13:6, the officers substantially interfered with the defendant's possessory interest in the bag. *See United States v. Terriques,* 319 F.3d 1051, 1056 (8th Cir.2003) (noting that when postal inspectors detained package to obtain a warrant, they exhibited "dominion and control" over the package that amounted to a seizure). By removing and then detaining the defendant's bag in the baggage terminal, the officers "interfered with a possessory interest in the luggage ... such that the expectation of timely delivery of the ... luggage has been frustrated." *Demoss,* 279 F .3d at 640 (Hansen, J. concurring) (*citing United States v. Johnson,* 990 F.3d 1129, 1132 (9th Cir.1993)). The officers removed and sequestered the bag without knowing whether their suspicions could be resolved before the defendant's bus left the station. Their testimony did not indicate that they made any arrangements for a sniff search, an act that might have justified the bag's removal. *Place,* 462 U.S. at 705. They thus interfered with the defendant's "contractually-based expectation that he would regain possession of the bag" when the bus arrived at

[3]The Supreme Court has held that the Fourth Amendment does not prohibit a temporary detention of personal luggage "for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics." *United States v. Place,* 462 U.S. 696, 698 (1983).

Washington, D.C. *Ward,* 144 F.3d at 1033.

Furthermore, analyzing the problem from a totality of the circumstances approach, the officers did not have reasonable suspicion, much less probable cause, to remove the bag and detain it. Reasonable suspicion is necessary to detain a person's luggage and it must derive from more than a hunch. *United States v. Tillman,* 81 F.3d 773, 775 (8th Cir.1996). Without at least reasonable suspicion, an officer may not even temporarily seize a person's luggage. *United States v. O'Neal,* 17 F.3d 239, 242 (8th Cir.1994). A warrantless seizure and detention of packages or baggage being transported by third parties such as Greyhound is permissible only if the officers have a reasonable and articulable suspicion of criminal activity. *Terry v. Ohio,* 392 U.S. 1, 20-23 (1968); *Place,* 462 U.S. at 708.

Eberle testified that his attention was drawn to the defendant's bag because it was new and because it had no handwritten name tag. Lack of a name tag alone does not create probable cause or even reasonable suspicion, *Gwinn,* 191 F.3d at 879 n. 5 (observing that "[m]any passengers do not place name tags on their luggage, particularly carry-on luggage"), particularly since the defendant's bag did have a Greyhound baggage tag. Nor could the "newness" of the defendant's bag alone have provoked reasonable suspicion, since all bags are, at some point, "new." Eberle did not testify that he noticed any unusual bulges, bumps, or smells coming from the bag. In fact, nothing about the external appearance of the luggage was different from the thousands of other bags deposited with common carriers by innocent travelers each day.

Therefore, if reasonable suspicion to seize and detain the bag existed, it could only be based on the information Eberle obtained from the Greyhound computer system about the bag. The computer revealed that the passenger with whom the bag was associated had purchased for cash a one-way ticket from Los Angeles (a known source city for drugs) to Washington, D.C. on the same day travel. Although this combination of

factors might have applied to scores of innocent bus passengers traveling on the day of the search, Eberle nevertheless claimed that he suspected, based on his experience as an interdiction officer, that the defendant's bag might contain contraband.

"Conduct that is typical of a broad category of innocent people provides a weak basis for suspicion." *United States v. Tillman,* 81 F.3d 773, 775 (1996). The totality of the circumstances here represents conduct typical of innocent people. There is no credible evidence that a person who paid $169 cash for a one-way bus ticket from Los Angles to Washington on the day of travel engaged in suspicious activity. See, e.g., White, 890 F.2d 1413, 1417 (8th Cir.1989) (finding that officers lacked reasonable, articulable suspicion to justify detention of a defendant or his luggage after the defendant deplaned from drug-source city, even though the defendant had purchased one-way ticket with cash).

The government seeks to apply the reasonable suspicion analysis previously used in airport search cases in this bus transportation case. Other than an interdiction officer's bare allegations about a particular bag's suspicious appearance, a court has no criteria for fairly deciding what luggage is reasonably suspicious and what luggage is not reasonably suspicious. Common experience suggests that most air passengers purchase tickets in advance, but there is no evidence that the same can be said for bus passengers. Common experience also suggests that most plane tickets are not purchased with cash, but again, there is no evidence that the same can be said for bus tickets. Common experience further suggests that the same holds true for the day on which bus versus airline passengers actually purchase tickets. In general, bus tickets are cheaper than most plane tickets. Bus transportation is more likely to be used by people who cannot afford the more costly plane tickets or who may not have credit cards with which to charge air fare in advance of departure. Bus tickets thus are more likely purchased for cash and on the same

day of travel.

The cold truth is that drug trafficking via bus, rail, and private transportation is increasing since all airplane luggage and packages can be searched. In response, the grounds for searching bus and rail baggage have quickly become so generalized that the government is now freely searching any bag that a government agent deems "suspicious." This court has heard every imaginable basis for searching so-called "suspicious" luggage: it is old, it is new; it had a handwritten identification tag or it did not; it is a soft bag, a garment bag, a duffel bag; the possessor is too nervous, too self-assured, too calm, too jittery; the bags are overstuffed or they are underpacked. In truth, the only consistent factors this court has discerned are, one, that the defendants are usually African-American or Hispanic and, two, they are traveling from the west or southwest parts of this country. The defendants' race or ethnic appearance may have no validity because the government has never produced as evidence statistics on the racial breakdown of individuals stopped for suspicious bags or on the racial breakdown of bus passengers in general. The geographic origin of a bus itinerary may also have no validity because local interdiction officers, by their own admission, only search buses traveling eastward from the west and southwest. *See, e.g.*, 8:03CR128, Filing No. 30, Transcript, 8:1-10. Ultimately, law enforcement officers offer no objective evidence whatever about the criteria for suspicious luggage.

Given the pervasive nature of drug abuse in this country and the reality that the transportation of drugs has moved from the air to the ground since 9/11, this court has little doubt that a search of all the luggage on board any bus or train would yield a surprising number of bags containing drugs. But since the Fourth Amendment has not yet been officially suspended for bus and train travel, this belief cannot be tested. Therefore, until Congress or a higher court determines that bus and train travelers no longer have any expectation of privacy with regard

to their luggage or personal property, this court finds that the removal of the defendant's bag and its sequestration in a room of the bus terminal constituted an unconstitutional seizure in violation of the defendant's Fourth Amendment rights because they occurred without consent, reasonable suspicion, probable cause, or a warrant.

B. Search of the Garment Bag

Because the seizure of the bag was unconstitutional, the next issue becomes whether the defendant's alleged consent to the search of the bag removed the taint of the unlawful seizure. The defendant objects to the magistrate judge's finding that his consent was knowingly and voluntarily given, noting that the police report failed to state how or when the defendant consented to the search.

When a person consents to a search following an illegal detention or seizure, that consent "may, but does not necessarily, dissipate the taint" of the prior Fourth Amendment violation. *United States v. Chavez-Villarreal,* 3 F.3d 124, 127 (5th Cir.1993). "Under the 'attenuation' exception to the exclusionary rule, evidence that is in some way the product of illegal police conduct may be admitted if it has become so distanced from the underlying illegal police conduct as to dissipate the taint of the illegal search or seizure." *United States v. Goodrich,* 183 F.Supp.2d 135, 145 (D.Mass.2001) (*citing Wong Sun v. United States,* 371 U.S. 471, 488 (1963)).

The challenged evidence is admissible if 1) the consent was voluntarily given, and 2) the consent was "an independent act of free will." *Chavez-Villarreal,* 3 F.3d at 127. The first prong of this test examines whether the defendant was coerced; the second prong examines whether the alleged consent was causally connected to the constitutional violation. *Id.* The government bears the burden to prove by a preponderance of the evidence that consent to search was freely given. *United States v. Smith,* 260 F.3d 922, 924 (8th Cir.2001) (*citing United States v. White,* 81 F.3d 775, 780 (8th Cir.1996)).

To determine the first prong, that is, whether a defendant voluntarily consented to a search, the court must consider the defendant's "age, intelligence, intoxication, advice of *Miranda* rights, and previous arrests." *United States v. Reinholz,* 245 F .3d 765, 780 (8th Cir.), *cert. denied,* 534 U.S. 896 (2001) (*citing United States v. Chaidez,* 906 F.2d 377, 381 (8th Cir.1990)). The court also considers the environment in which the consent was allegedly given, looking at the length of detention, any threats or misrepresentations by police, whether the suspect was in custody or under arrest, whether the place where the arrest occurred was public or private, and whether the suspect made any contemporaneous objections or representations. *Id.*

Here, the defendant is an adult who on the day of his arrest appeared to Eberle sober and of normal intelligence; in fact, the defendant at the suppression hearing testified that he had attended college, TR at 79:9-15. He voluntarily came to the ticket counter when summoned by Eberle's page over the terminal intercom. After confirming that the defendant's name matched that on the baggage ticket, Eberle asked the defendant to accompany him, and the defendant acquiesced. Eberle led the defendant out of the public area of the terminal and to the rear baggage terminal, where at least two other officers were waiting with the bag in a room with two open doors. Eberle testified that the defendant then consented to the search, but what the defendant said or did to consent is unclear from the testimony. *See* TR at 19:22-25;49:20-50:9;51:10-53:1;53:9-55:18;73:3-74:7;76:1-77:6;81:17-82:18;85:8-25. The defendant's own testimony indicates that he did not object to the search. TR at 82:7-18. Although the defendant testified that he did not know his rights at the time of the search, officers are not required to tell bus passengers that they have a right to refuse to cooperate and to refuse consent to a search. *United States v. Drayton,* 536 U.S. 194, 206-207 (2002); *United States v. Smith,* 260 F.3d 922, 924 (8th Cir.2001) (*citing United States v. Barahona,* 990 F.2d 412, 417 (8th Cir.1993)). The officers

did not give the defendant his *Miranda* warnings until after he had been transported from the bus terminal to a Nebraska State Patrol office for questioning. The record does not make clear whether the defendant had a history of prior arrests. Eberle was in plainclothes and his weapon was not visible. Nothing in the testimony suggests that Eberle or Lutter directly threatened or coerced the defendant.

However, there is no reason to believe that the defendant or anyone else-even most lawyers-would know that they could refuse the request to search the bag. The defendant here was alone, in a private room, with at least two armed police officers. His bag was already in the possession of law enforcement officers, and they then asked him if they can search the bag. Under the totality of the circumstances, no reasonable person would believe that he or she had a choice about the search. Certainly the defendant did not explicitly consent to the search. Based on all these factors, I conclude that the defendant's consent was not voluntarily given.

To determine the second prong, that is, whether a defendant's consent to the search was an independent act of free will that broke the causal chain between the unconstitutional violation and the consent, three factors are relevant: "the temporal proximity of the [seizure and the consent], the presence of intervening circumstances, and particularly, the purpose and flagrancy of the official misconduct." *Brown v. Illinois,* 422 U.S. 590, 603-04 (1975); *see also United States v. Moreno,* 280 F.3d 898, 900 (8th Cir.2002). The burden is on the government to prove that the connection between the illegal arrest and the confession has been broken. *Brown,* at 604.

First, the temporal proximity of the unconstitutional seizure of the bag and the defendant's consent to search it strengthens the connection between the two and weighs in favor of excluding the evidence as an involuntary consent. Very little time elapsed between Eberle's decision to remove and sequester the defendant's bag and the defendant's consent to search it. In

that time, Eberle paged the defendant to the ticket counter, told him there was a problem with his bag, asked him to accompany him to the rear baggage terminal, and upon entering the baggage room, asked for his consent to search. No more than a few minutes could have elapsed.

Second, the court must inquire whether intervening circumstances purged the taint of the unlawful seizure. Common examples of intervening circumstances include telling a suspect he can refuse consent to a search, releasing a suspect from custody, bringing the suspect before a magistrate, or permitting the suspect to speak to a lawyer. *See, e.g., Moreno,* 280 F.3d at 901; *United States v. Delgadillo-Velasquez,* 856 F.2d 1292, 1300 (9th Cir.1988). Here, however, nothing in the record indicates the presence of an intervening circumstance which led the defendant to consent to the search. Therefore, this factor suggests that the defendant's consent was not voluntary.

The final *Brown* factor examines the purpose and the flagrancy of the official's misconduct. Eberle testified that he brought the bag inside to the rear baggage terminal because Greyhound discourages interdiction officers from speaking to bus passengers and others in the refueling area. TR at 58:15-59:2. According to Eberle, interdiction officers apparently had been removing and sequestering bags pursuant to Greyhound's policy for over a year prior to the events at issue without any legal challenge. TR at 59:3-22. However, Greyhound's policy cannot make the seizure constitutionally permissible. While Greyhound had the right to remove a bag in its custody and control and take it to a private area inside its terminal, the officers did not. Furthermore, the officers could have obviated this entire issue had they used Eberle's drug dog, who was apparently at the bus station on the day in question. Eberle offered no reason for seizing the bag rather than subjecting it to a canine sniff. *See* TR at 25:16-26:4. While the officers' seizure was not a "flamboyantly flagrant" Fourth Amendment violation, I find Eberle's decision to seize and

sequester the bag "was clearly motivated by an unrestrained desire to find evidence despite the lack of search warrant or probable cause." *Goodrich*, 183 F.Supp.2d at 148. The officers asked for the defendant's consent to search only after they had already examined and handled the bag and then carried it inside the terminal. Such thorough "dominion and control" might easily have also included exploratory-but still illegal-manipulation of the bag's contents.

I find that all three of the *Brown* factors weigh against a finding that the defendant's consent was an independent act of free will. I find that the causal chain between the illegal seizure and the defendant's consent was never broken. The defendant's apparent acquiescence did not remove the taint of the illegal seizure. Consequently, the evidence obtained in the search after the illegal seizure is "fruit from a poisonous tree." For these reasons, the defendant's motion to suppress the evidence is granted.

C. Use of Va Lerie's Statements for Impeachment Purpose

For the reasons stated in Magistrate Judge Thalken's report and recommendation, I find that the government has failed to carry its burden of proving by a preponderance of evidence that the defendant voluntarily made the statements to Eberle and Lutter. Consequently, the statements will be inadmissible at trial for any purpose, including impeachment. Accordingly,

IT IS ORDERED:

1. The defendant's objection, Filing No. 22, to the report and recommendation, Filing No. 19, is sustained;

2. The government's objection, Filing No. 20, to the report and recommendation, Filing No. 19, is overruled;

3. The report and recommendation, Filing No. 19, is adopted in part as detailed in this memorandum and order; and

4. The defendant's motions to suppress, Filing Nos. 11 and 13, are sustained.

(INTENTIONALLY LEFT BLANK)

United States District Court,D. Nebraska.
UNITED STATES OF AMERICA, Plaintiff,
v.
Keith A. VA LERIE, Defendant.
No. 8:03-CR-23.

June 10, 2003.

REPORT AND RECOMMENDATION
THALKEN, Magistrate J.

This matter is before the court on the motions to suppress by defendant Keith Va Lerie (Va Lerie) (Filing Nos. 11 and 13). Va Lerie is charged in an indictment with possession with the intent to distribute 500 grams or more of a mixture of a substance containing a detectable amount cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1). Va Lerie seeks to suppress physical evidence obtained as a result of a search of his belongings on December 23, 2002, (Filing Nos. 11 and 13) and to suppress statements Va Lerie made to Nebraska State Patrol (NSP) investigators during an interview following the search on December 23, 2002 (Filing No. 13).

The court conducted an evidentiary hearing on this motion on April 1, 2003. At the hearing, the court heard testimony from NSP Investigator Alan Eberle, Jr. (Investigator Eberle). The court also heard testimony from the defendant Keith Va Lerie. The court received into evidence: Exhibit 1-Va Lerie's identification card; Exhibit 2-a videotape of an interview of Va Lerie conducted by NSP investigators; and Exhibit 101-a hand drawing of the bus station location where the search was conducted. A transcript of the hearing was filed on April 14, 2003 (TR.-Filing No. 17). A post-hearing brief was filed by the government on April 17, 2003 (Filing No. 18-Government Brief).

FINDINGS OF FACT

On December 23, 2002, Investigator Eberle was assigned to the NSP Commercial Interdiction Unit, and was conducting his duties at the Greyhound Bus Station in Omaha (TR. 6-7). At around noon, Investigator Eberle was watching a bus that was coming from Los Angeles, California. After the bus emptied of passengers, the bus was parked in the refueling area of the terminal. There, Investigator Eberle conducted an investigation of the luggage bins for suspicious luggage (TR. 8-10).

During the investigation, Investigator Eberle's attention was drawn to a black garment bag that originated in Los Angeles and was destined for Washington, D.C. Investigator Eberle noticed the bag was a newer bag. There was only one bag with the passenger name on the baggage ticket, and a phone number had not been filled out on the baggage ticket (TR. 9). Investigator Eberle obtained this information from the baggage claim tag affixed to the bag, which was generated by Greyhound employees (TR. 10). Investigator Eberle also noticed the bag did not have a handwritten name tag (TR. 8-11). Investigator Eberle wrote down the claim number from the baggage claim tag and conducted a computer check inside the bus terminal (TR. 11). As a result of the computer check, Investigator Eberle learned the ticket had been purchased with cash for $164, it was purchased on the same day of travel, it was a one-way ticket, and no one else was traveling on the same itinerary. The name on the bag was that of Valerie Keith (TR 11-12, 63).

After receiving the information from the computer check, Investigator Eberle had the bag removed from the bus and brought into the rear baggage terminal by NSP investigators (TR. 12). According to Investigator Eberle, the removal of the bag is a typical practice due to an understanding with NSP and Greyhound that Greyhound does not want an excess of people in the refueling area (TR. 58-59). Investigator Eberle had the names "Valerie Keith" and "Keith Va Lerie" paged over the bus

terminal intercom (TR. 12). Va Lerie approached the ticket counter where Investigator Eberle made contact with Va Lerie (TR. 13). Investigator Eberle, presented his badge, explained he (Investigator Eberle) was a law enforcement investigator, advised Va Lerie that Va Lerie was not under arrest or in any kind of trouble, and asked if he (Va Lerie) would speak with Investigator Eberle (TR. 13-14). Va Lerie agreed to speak with Investigator Eberie. Investigator Eberie asked for and received Va Lerie's identification card and bus ticket to confirm that Va Lerie was the person who matched the name on the garment bag (TR. 14-15). Investigator Eberle returned the identification card and bus ticket to Va Lerie and asked Va Lerie if Va Lerie would follow Investigator Eberle back to the rear baggage terminal (TR. 17). Va Lerie followed Investigator Eberle back to the rear baggage terminal, a room that had two open doors (TR 18). When Va Lerie and Investigator Eberle entered the rear baggage terminal, Investigator Lutter and one or two other officers were present (TR. 19, 64-65, 75). Investigator Eberle asked Va Lerie if the garment bag belonged to Va Lerie. Va Lerie acknowledged the bag belonged to him (TR. 19). Investigator Eberle explained he was a narcotics investigator and he was watching for people possibly transporting illegalitems from Los Angeles to Washington or anywhere on the East Coast (TR. 19). Investigator Eberle asked if Va Lerie had any additional bags and asked Va Lerie for consent to search the garment bag (TR. 19). According to Investigator Eberle, Va Lerie made an affirmative verbal response to the request for consent to the search (TR. 19). A report of the search, filled out by Investigator Eberle, stated Va Lerie had consented to the search, but did not state if there was a verbal response or the content of the response given by Va Lerie (TR 49-57). Pursuant to the alleged consent, Investigator Lutter conducted a search of the bag that lasted approximately one minute (TR. 20-23). During the search, Investigator Eberle made a comment about the garment bag, to which Va Lerie responded the bag belonged to a friend of his (TR. 21, 83). The search of the bag revealed five

vacuum sealed bags containing cocaine (TR. 22).

After the discovery of the cocaine, Va Lerie was arrested, placed in handcuffs and taken to an NSP office where an interview was attempted (TR. 24-25). During this encounter Va Lerie was informed of his *Miranda* rights according a NSP advice of rights form (TR. 55). Investigator Eberle read the rights individually and asked if Va Lerie understood the meaning. See Exhibit 2. Va Lerie responded he understood each right. *Id.* After going through the form Investigator Eberle asked Va Lerie to waive his rights and requested to conduct an interview with Va Lerie. *Id.* Va Lerie did not sign the waiver form and requested an attorney. *Id.* Investigator Eberle explained the NSP would like Va Lerie to cooperate with them in order to help the NSP determine where and to whom the cocaine was going and there was a limited amount of time to prepare to intercept the recipient of the cocaine. *Id.* Investigator Eberle proceeded to explain that Va Lerie would probably be federally prosecuted and possible consequences would ensue. *Id.* Va Lerie responded by expressing concern for his safety and stating he still wanted to have an attorney. Investigator Lutter addressed Va Lerie's safety concern by stating, that in his (Investigator Lutter's) extended experience, he had never had an informant or cooperative be injured as a result of their cooperation. *Id.* Va Lerie made statements about the type of people he was dealing with and the severity of his situation and stated again he wanted an attorney before doing an interview.

LEGAL ANALYSIS

Va Lerie seeks to suppress evidence taken during the seizure and search of the garment bag on December 23, 2002. See Filing No. 11. The government conceded the suppression of Va Lerie's statements during interview on December 23, 2002, during the government's case-in-chief, but requested use of those statements for impeachment purposes. (TR. 4). (See also Filing No. 13),

A. Seizure Of The Garment Bag

The Fourth Amendment prohibits "unreasonable searches and seizures" and assures "the right of the people to be secure in their persons, houses, papers, and effects." "[T]he touchstone of the Fourth Amendment is reasonableness. Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette,* 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (citing *Florida v. Jimeno,* 500 U.S. 248, 250, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991)). A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984); *United States v. Demoss,* 279 F.3d 632, 635 (8th Cir.2002). The seizure of personal property is per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause. *United States v. Place,* 462 U.S. 696, 701 (1983). Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Fourth Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present. *Id.* See also *Arkansas v. Sanders,* 442 U.S. 753, 761, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); *United States v.. Chadwick,* 433 U.S. 1, 17, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). Probable cause exists where, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Va Lerie contends the removal of the bag from the luggage bins was an unreasonable seizure without a warrant or a sufficient showing of probable cause. (TR. 96) (Filing No. 11 & 13). Investigator Eberle removed the bag from the luggage

bin to the baggage terminal without a warrant based on information received from the baggage claim tag and the computer check. The court does not find this information sufficient to develop probable cause. However, brief detentions of luggage in these situations are justified under the principles of *Terry,* as long as the detention is not an unreasonable intrusion upon Va Lerie's legitimate privacy expectations. *Demoss,* 279 F.3d, at 636.

When the nature and extent of the detention are minimally intrusive of an individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause. *Place,* 462 U.S. at 707. When an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided the investigative detention is properly limited in scope. *Id.* The exception to the probable-cause requirement for limited seizures rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved. *Id.* at 703 (citing *Terry v. Ohio,* 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). The nature and quality of the intrusion on the individual's Fourth Amendment interests must be balanced against the importance of the governmental interests alleged to justify the intrusion. *Id.* Where the authorities possess specific and articulable facts warranting a reasonable belief that a traveler's luggage contains narcotics, the governmental interest in seizing the luggage briefly to pursue further investigation is substantial. *Id.* Investigative detentions are seizures of limited scope and duration within the meaning of the Fourth Amendment and must be supported by a reasonable, articulable suspicion of criminal activity, see, e.g., *United States v. Sokolow,* 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); *Reid v. Georgia,* 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980); *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d

889 (1968); *United States v. Weaver,* 966 F.2d 391 (8th Cir.), *cert. denied,* 506 U.S. 1040, 113 S.Ct. 829, 121 L.Ed.2d 699 (1992); *United States v. Galvan,* 953 F.2d 1098 (8th Cir.1992).

In this case, Va Lerie had turned the garment bag, with an attached claim tag on the outside, over to the custody of Greyhound for transportation to the destination city. A person has no legitimate expectation of privacy in information that is voluntarily turned over to third parties. *Demoss,* 279, F.3d at 635. Although Va Lerie might have a reasonable expectation that the bag would not be turned over to police investigators and subjected to a search (TR. 71), there is no legitimate expectation that characteristics on the outside of the bag would not be observed by law-enforcement investigators. *Id.* Using the information obtained from the claim tag on the outside of the bag, Investigator Eberle furthered his investigation by doing a computer check inside the bus terminal. Based on Investigator Eberle's experience with the Nebraska State Patrol's Commercial Interdiction Unit (TR. 6-7), the information obtained from the outside of the bag and from the computer check meet the requisite level of reasonable articulable suspicion in order to briefly detain the bag under *Terry.* In addition, the removal of the bag was done in accordance to an understanding between Greyhound and the NSP to prevent passengers from walking into the refueling area (TR. 58). The removal of the bag to the rear baggage area of the terminal was not unreasonable.

The investigators' actions after the removing the bag from the bus and taking into the terminal were reasonable under the Fourth Amendment. A detention based upon reasonable suspicion is justifiable as long as the detention is minimally intrusive. *Place,* 462 U.S. at 709. The brevity of the invasion of individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable based upon reasonable suspicion. *United States v. Sharpe,* 470 U.S. 675, 687, 105 S.Ct. 1568, 84 L.Ed.2d 605

(1985). Police diligence in the pursuit of their investigation, the law enforcement purposes to be served by the stop, as well as the time reasonably needed to effectuate those purposes are important considerations in assessing the appropriate length of the detention. *Id.; Place,* 470 U.S. at 710; *Demoss,* 279 F.3d 637. Investigator Eberle had Va Lerie paged after the bag was removed from the bus, Va Lerie responded promptly to the page, and the search was conducted shortly thereafter (TR. 12 -13). According to these facts, the detention of the bag was minimally intrusive and was not unreasonable under the Fourth Amendment.

B. Consent to Search

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *Chadwick,* 433 U.S. at 17. A person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. *Id.* at 13. A bus passenger possesses a privacy interest in the contents of his luggage and such luggage is protected by the Fourth Amendment. *United States v. Place,* 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *United States v. Gwinn,* 191 F.3d 874, 878 (8th Cir.2000).

"A consensual search does not violate the Fourth Amendment if the consent was voluntarily given without coercion." *United States v. Morris,* 910 F.Supp. 1428, 1446 (N.D.Iowa 1995) (internal citations omitted). The Fourth Amendment test for valid consent to search is that the consent be voluntary, and such "[v]oluntariness is a question of fact to be determined from all the circumstances." *Ohio v. Robinette,* 519 U.S. 33, 40, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996); see *United States v. Hathcock,* 103 F.3d 715, 719-20 (8th Cir.), cert. denied, 521 U.S. 1127, 117 S.Ct. 2528, 138 L.Ed.2d 1028 (1997). A voluntary consent to search, either express or implied, is a waiver of one's Fourth Amendment rights. *United States v. Chaidez,* 906 F.2d 377, 380 (8th Cir.1990). The

burden is on the government to prove by a preponderance of the evidence using the totality of the circumstances that the defendant's consent was voluntarily given. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Knight,* 58 F.3d 393, 397 (8th Cir.1995), *cert. denied,* 516 U.S. 1099, 116 S.Ct. 827, 133 L.Ed.2d 770 (1996); *United States v. Severe,* 29 F.3d 444, 446 (8th Cir.1994). Consent is not voluntary when it is the product of duress or coercion, either express or implied. *United States v. Pena-Saiz,* 161 F.3d 1175, 1177 (8th Cir.1998). Numerous factors have been put forth as factors to be considered, such as: age, education, language fluency, prior criminal history, employment, advice of *Miranda* rights, advice as to the right to refuse consent, the absence of objection during a search, location of the search, whether or not the person was in custody or under arrest, and whether or not the person was under the influence of an intoxicating substance. In other words, all of the circumstances of the environment of the giving of the consent must be taken into consideration. Even in a situation where a person was illegally detained immediately prior to the consent, the illegal detention does not automatically vitiate the consent. *United States v. Thomas,* 83 F.3d 259, 260 (8th Cir.1996); *United States v. Ramos,* 42 F.3d 1160, 1164 (8th Cir.1994), *cert. denied,* 514 U.S. 1134, 115 S.Ct. 2015, 131 L.Ed.2d 1013 (1995).

Va Lerie initially contends he did not consent to the search of the bag and he did not respond to the request for consent (TR. 74 & 98). However, Va Lerie testified it is possible he could have said something (TR. 84), but still contends consent was never given. Investigator Eberle testified he was given an affirmative verbal response to his request for consent (TR. 20). Investigator Eberle then filled out a report noting that consent was given. Va Lerie contends the government did not meet the burden of the preponderance of the evidence. The only evidence offered by the defense is the defendant's testimony that he did not consent to the search, and the fact that Investigator Eberle

did not report the exact language of Va Lerie's response. The government offers the testimony of Investigator Eberle along with a report stating consent was given. Although Investigator Eberle did not include Va Lerie's exact words in the report, Investigator Eberle did report consent was given. The court will credit Investigator Eberle's testimony. The government has met the burden of the preponderance of the evidence.

Secondly, the Va Lerie contends there is a voluntariness issue due to the fact that he was not aware of his right to refuse consent (TR 99-100). The defense bases this argument on Va Lerie's assertion of rights during the interview later on that day (TR. 100) and his acknowledgment and waiver of rights at the hearing (TR. 70). Va Lerie is 37 years old and has three years of college education (TR. 69), understood the questions and comments being made by Investigator Eberie, and was not under the influence of an intoxicating substance (TR. 16-17). Investigator Eberie showed Va Lerie his badge (TR. 13, 80), explained he was a law enforcement investigator (TR. 13), told Va Lerie that he was not in any kind of trouble, and asked Va Lerie to follow him to the baggage terminal (TR. 14, 17). After Investigator Eberle and Va Lerie reached the baggage terminal, Investigator Eberle further explained he was a narcotics investigator and asked for consent to search (TR. 19). The search was conducted in the baggage terminal, a room with two open doors, and in the presence of two to four officers. Investigator Eberle did not advise Va Lerie of his right to refuse consent (TR. 57) and Va Lerie did not object to the search once the alleged consent was given (TR. 82). Knowledge of the right to refuse consent is not a prerequisite of a voluntary consent but rather a factor. *Schneckloth v. Bustamonte,* 412 218, at 234 (1973). There is no evidence of coercion or duress involved in the encounter. When all of the factors are considered under the totality of the circumstances, the court finds Va Lerie's consent was voluntary. The defendant's motion to suppress the evidence from the garment bag should be denied.

C. Use of Va Lerie's Statements For Impeachment

The touchstone for the admissibility of a defendant's statements is voluntariness. *Brown v. Mississippi,* 297 U.S. 278, 279, 56 S.Ct. 461, 80 L.Ed. 682 (1936). The court must look to the totality of circumstances in determining whether or not the statements were voluntary. *Mincey v. Arizona,* 437 U.S. 385, 401, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Colorado v. Connelly,* 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). In determining whether a defendant made statements voluntarily, the court must determine if the accused was coerced or his will was overborne. *United States v. Wilson,* 787 F.2d 375, 380-81 (8th Cir.), cert. denied, 479 U.S. 857, 107 S.Ct. 197, 93 L.Ed.2d 129 (1986). The court must consider the totality of the circumstances, including the specific interrogation tactics employed, the details of the interrogation, and the characteristics of the accused. *Schneckloth,* 412 U.S. at 225-26. Coercive police pressure is a predicate to the finding that the confession is not voluntary and violates the accused's due process rights. *Connelly,* 479 U.S. at 167.

Once a suspect invokes his right to counsel, he may not be subjected to further questioning in the absence of counsel unless the subject reinitiates the conversation. *Edwards v. Arizona,* 451 U.S. 477, 484-485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The *Edwards* rule exists in order to "prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Michigan v. Harvey,* 494 U.S. 344, 350, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990). Statements obtained in violation of *Miranda* may be used as impeachment of a testifying defendant even though they are inadmissible in the government's case-in-chief. *Harris v. New York,* 401 U.S. 222, 224, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); *Oregon v. Hass,* 420 U.S. 714, 722, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); *United States v. Rooks,* 577 F.2d 33, 37 (1978). However such use is

available only when the statements are trustworthy. *Harris*, 401 U.S. at 224. If the statements are involuntary, their use at a criminal trial would be a denial of due process and are inadmissible for any purpose. *Mincey*, 437 U.S. at 398.

The government concedes to the suppression of the statements made by Va Lerie during the interview in their case-in-chief, but requests the use of the statements for impeachment. Investigator Eberle and Investigator Lutter began the interview with Va Lerie by using a NSP *Miranda* from where Va Lerie was read his rights and asked whether or not he under stood his rights. (Exhibit 2). Va Lerie invoked his right to an attorney at which point Investigator Eberle and Investigator Lutter are required to end the interview under *Miranda* and *Edwards*. However, Investigator Eberle and Investigator Lutter attempted to persuade Va Lerie into conducting the interview by stating it was important they receive the information quickly and explaining that Va Lerie would be federally prosecuted and the penalties involved in federal prosecution. Va Lerie expressed concern for his safety, at which time Investigator Lutter tried further to persuade Va Lerie to cooperate by telling Va Lerie that Investigator Lutter had never had anyone injured as a result of cooperation in his experience. Va Lerie made further comments in an attempt to justify to the investigators his assertion of rights. Investigator Eberle's and Investigator Lutter's attempts to persuade Va Lerie to cooperate with them weigh against voluntariness of the statements. The court finds the government has not carried its burden of to prove by a preponderance of the evidence that the statements were provided voluntarily. Accordingly, the statements made by Va Lerie should be suppressed for all purposes, including impeachment, during any trial of the defendant.

IT IS RECOMMENDED TO JUDGE JOSEPH F. BATAILLON that:

1. Va Lerie's motion to suppress (Filing No. 11) be denied.

2. Va Lerie's motion to suppress (Filing No. 13) be denied as to physical evidence obtained as a result of the search and granted as to Va Lerie's statements made to investigators following the search.

3. The government's request for use of Va Lerie's statements for impeachment be denied.

ADMONITION

Pursuant to NELR 72.4 any objection to this Report and Recommendation of this order shall be filed with the Clerk of the Court within ten (10) days after being served with a copy of this Report and Recommendation. Failure to timely object may constitute a waiver of any such objection. The brief in support of any objection shall be filed at the time of filing such objection. Failure to file a brief in support of any objection may be deemed an abandonment of the objection.

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United States Court of Appeals,Eighth Circuit.
UNITED STATES of America, Appellant,
v.
Keith A. VA LERIE, Appellee.
No. 03-3394.

Submitted: March 9, 2004.
Filed: Oct. 14, 2004.
Rehearing En Banc Granted Feb. 17, 2005.

Before RILEY, McMILLIAN and MELLOY, Circuit Judges.
MCMILLIAN, Circuit Judge.

Keith A. Va Lerie ("defendant") was charged by indictment in the United States District Court.[1] for the District of Nebraska on one count of possession with intent to distribute 500 grams or more of a mixture containing cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1). Now before this court is an interlocutory appeal by the government from an order of the district court granting defendant's motion to suppress evidence obtained when defendant's garment bag was searched while he was traveling by bus and stopped at a bus station. *United States v. Va Lerie*, No. 8:03CR23, 2003 WL 21956437 (D.Neb. Aug. 14, 2003) (memorandum and order) (hereinafter "District Court Order"). For reversal, the government argues that the district court (1) erred in holding that defendant's garment bag was "seized" within the meaning of the Fourth Amendment when the bag was removed from the bus and brought to a room in the rear baggage terminal for the purpose of seeking the owner's consent to search the bag and (2) clearly erred in finding that defendant's alleged consent to the search of his garment bag was not express and was not voluntarily given. For the reasons

[1] The Honorable Joseph A. Bataillon, United States District Judge for the District of Nebraska.

stated below, we affirm the order of the district court.

Jurisdiction was proper in the district court based upon 18 U.S.C. § 3231. Jurisdiction is proper in this court based upon 18 U.S.C. § 3731. The notice of appeal was timely filed pursuant to Fed. R.App. P. 4(b).

Background

Defendant was indicted on January 23, 2003. On March 10, 2003, he filed his motion to suppress. The motion was submitted to a magistrate judge, who held an evidentiary hearing and permitted the parties to file post-hearing briefs. Following those proceedings, the magistrate judge issued a report and recommendation on June 10, 2003. *United States v. Va Lerie,* No. 8:03CR23, 2003 WL 21953948 (D. Neb. June 10, 2003) (hereinafter "Magistrate Judge's Report"). In his report, the magistrate judge made the following findings of fact.

On December 23, 2002, defendant was traveling from Los Angeles, California, to Washington, D.C., on a Greyhound bus. The bus stopped for refueling at approximately 12:00 noon at the Greyhound bus station in Omaha, Nebraska. At that time, Investigator Alan Eberle of the Nebraska State Patrol ("NSP") was at the Omaha Greyhound bus station performing duties for the NSP Commercial Interdiction Unit. While defendant's bus was being refueled, Eberle looked in the lower luggage compartments of the bus. He noticed a newer-looking garment bag among three or four other bags inside one of the luggage compartments. That garment bag had a baggage ticket bearing an individual's name but no telephone number. It had no additional handwritten name tag. Eberle ran a computer check of the claim number appearing on the baggage ticket and learned that the passenger, using the name "Valerie Keith," had paid $164 in cash on the day of travel for a one-way ticket. Eberle then had NSP investigators remove the garment bag from the bus and take it into a room in the rear baggage terminal. Eberle had "Valerie Keith" or "Keith Valerie" paged over the intercom system with instructions to come to the ticket

counter. When defendant responded, Eberle showed defendant his NSP badge and identified himself as a law enforcement officer. Eberle told defendant that he was not in trouble and not under arrest. Eberle asked defendant to produce his bus ticket and some identification, which defendant did. After confirming that the name on the ticket and identification matched the name on the garment bag, Eberle returned the ticket and identification to defendant. Eberle then led defendant to the room in the rear baggage terminal where defendant's garment bag was being held. The room had two open doors, and inside the room were two or three officers. One of the officers in the room was Omaha Police Investigator Lutter. When asked if the garment bag was his, defendant confirmed that it was. Eberle told defendant that he was a narcotics investigator and that he was watching for people who might be transporting illegal drugs. According to Eberle, he asked defendant for permission to search the garment bag and defendant "made an affirmative verbal response to the request for consent to the search." Magistrate Judge's Report at 3.[2] Lutter searched the garment bag. The search took approximately one minute. During the search Eberle made a comment about the garment bag, and defendant responded that it belonged to a friend. Lutter found inside the garment bag five vacuum-sealed bags containing cocaine. Defendant was placed under arrest and taken to an NSP office where he was read his *Miranda* rights. Defendant declined to waive his *Miranda* rights, declined to be interviewed, and requested an attorney.[3]

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[2]However, when Eberle later filled out a police report concerning the incident, he provided no details about what defendant said to give consent to the search of the garment bag. Magistrate Judge's Report at 3.

[3]After defendant expressly declined to waive his *Miranda* rights and requested an attorney, Eberle and Lutter continued to press him to cooperate. Eberle told defendant that he (defendant) "would probably be federally prosecuted if he did not cooperate and possible consequences would ensue"; when defendant expressed fears about cooperating, Lutter stated that "in his (Investigator Lutter's) extended experience, he had never had an informant

The magistrate judge determined that, at the time the garment bag was removed from the bus and taken to the room in the rear baggage terminal, a Fourth Amendment seizure occurred in the form of an investigative detention. Magistrate Judge's Report at 5-6. The magistrate judge nevertheless opined that Eberle had "the requisite level of reasonable articulable suspicion" to justify the seizure. *Id.* at 6. The magistrate judge also noted that "the removal of the bag was done in accordance to an understanding between Greyhound and the NSP to prevent passengers from walking into the refueling area." *Id.* at 6. The magistrate judge concluded that, under the totality of the circumstances, no Fourth Amendment violation occurred as a result of the seizure of defendant's garment bag. *Id.* at 6-7. The magistrate judge additionally concluded that defendant had voluntarily consented to the search of the garment bag. *Id.* at 8-9. The magistrate judge thus recommended denial of defendant's motion to suppress physical evidence obtained as a result of the search of the garment bag.

The parties filed objections to the Magistrate Judge's Report.[4] Regarding the seizure of the garment bag, the district

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or cooperative be injured as a result of [his or her] cooperation." Magistrate Judge's Report at 3-4. In his motion to suppress, defendant sought suppression of all statements he made after invoking his *Miranda* rights. The government argued that, notwithstanding the admitted *Miranda* violation, the statements in question should nevertheless be admissible to impeach defendant. The magistrate judge rejected the government's argument and recommended suppression of defendant's statements. *Id.* at 10-11. The government objected to that aspect of the magistrate judge's report and recommendation. On review, the district court held that the statements were "inadmissible at trial for any purpose, including impeachment." District Court Order at 16-17. The government has not appealed that ruling.

[4]Defendant objected to, among other aspects of the Magistrate Judge's Report, the conclusions that the seizure of the garment bag was based on articulable suspicion, that the seizure was reasonable, that he gave consent to the search of the garment bag, and that such consent, if given, was valid. The government objected to the magistrate judge's report insofar as it

court held: "the removal of the defendant's bag and its sequestration in a room of the bus terminal constituted an unconstitutional seizure in violation of the defendant's Fourth Amendment rights because they occurred without consent, reasonable suspicion, probable cause, or a warrant." District Court Order at 11. Regarding the voluntariness of defendant's alleged consent to the search of the garment bag, the district court noted, among other things, that defendant was a person of sufficient intelligence to give consent, the officers were not required to tell him that he could withhold consent, and Eberle was in plain clothes with no visible weapon; on the other hand, defendant was "alone, in a private room, with at least two armed police officers" and "[h]is bag was already in the possession of law enforcement officers" when he allegedly gave his consent for them to search it. The district court concluded that, under the totality of the circumstances, "defendant's consent was not voluntarily given." *Id.* at 14. Moreover, the district court noted that little time had transpired between the seizure of the garment bag and defendant's consent, and there were no significant intervening events. The district court held that, notwithstanding Eberle's testimony that he was merely accommodating Greyhound's request that they not bring passengers to the bus while it was parked in the refueling area, the government had not met its burden to prove that defendant's consent was an independent act of free will which broke the causal connection between the constitutional violation and the consent that led to the discovery of evidence. *Id.* at 12-16. The district court thus concluded that the taint of the illegal seizure had not been purged. The district court granted defendant's

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"denie[d] the use of defendant's statements for impeachment purposes should the defendant testify at trial." *See* Original U.S. District Court File (Documents # 20 and # 22). On review, the district court additionally addressed the question of whether a Fourth Amendment seizure had occurred as a result of the garment bag being removed from the bus and detained in the room in the rear baggage terminal, even though the government did not specifically object to that aspect of the Magistrate Judge's Report.

motion to suppress, and the government timely filed this interlocutory appeal.

Discussion

As a general rule, "[w]e review the district court's decision to grant a suppression motion de novo while reviewing the underlying factual determinations for clear error." *United States v. Logan,* 362 F.3d 530, 532 (8th Cir.2004) (citing *United States v. Walker,* 324 F.3d 1032, 1036 (8th Cir.2003) (*Walker*), *cert. denied,* 540 U.S. 898, 124 S.Ct. 247, 157 L.Ed.2d 178 (2003)). For purposes of the issues raised by the government in the present appeal, we review de novo the district court's legal conclusions concerning whether a seizure has occurred within the meaning of the Fourth Amendment, and we review for clear error the district court's factual findings regarding the nature of defendant's alleged consent to the search. *See, e.g., United States v. Smith,* 260 F.3d 922, 924 (8th Cir.2001) ("We review the question of whether a seizure has occurred de novo and the district court's determination of voluntariness for clear error.") (citing *United States v. Mendoza-Cepeda,* 250 F.3d 626, 628 (8th Cir.2001)).

Property is "seized" within the meaning of the Fourth Amendment when there is "some meaningful interference with an individual's possessory interests in that property." *United States v. Demoss,* 279 F.3d 632, 635 (8th Cir.2002) (*Demoss*) (quoting *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984)); *United States v. Riley,* 927 F.2d 1045, 1047 (8th Cir.1991) (same). The government first argues that defendant's garment bag was not "seized" in the constitutional sense when Eberle had the bag removed from a lower luggage compartment on the bus and taken to a room in the rear baggage terminal at the Omaha Greyhound bus station. For support, the government highlights Eberle's testimony at the suppression hearing that, in order to accommodate Greyhound's request not to have excess people in the refueling

area, it had been NSP's practice for over a year to have any suspicious bag found on a bus brought into the rear baggage terminal before an attempt was made to contact the owner. Eberle also testified that NSP had never previously been advised that their practice of bringing bags into the rear baggage terminal was unconstitutional. He stated that it was his understanding that, when an NSP officer removed a bag from a bus in this manner, the bag nevertheless remained in Greyhound's custody and the officers were merely taking care of it.

The government further argues that there is no meaningful distinction-in terms of interference with an individual's possessory interests-between removing a bag from a luggage compartment and setting it down in or near the bus and moving the bag from the bus to a location farther away. The difference, the government maintains, is merely a "geographical consideration." Brief for Appellant at 10.

The government also suggests that the handling of luggage not in an individual's actual physical possession is analogous to the handling of packages placed in the mail stream. *Id.* (citing *United States v. Harvey,* 961 F.2d 1361 (8th Cir.1992) (*Harvey*) (per curiam), *cert. denied,* 506 U.S. 883, 113 S.Ct. 238, 121 L.Ed.2d 173 (1992); *United States v. Riley,* 927 F.2d 1045 (8th Cir.1991)). Thus, in further support of its argument that no seizure occurred under the Fourth Amendment, the government cites *Demoss* and *United States v. Gomez,* 312 F.3d 920 (8th Cir.2002) (*Gomez*), as analogous mail stream cases. The government also cites, as factually similar, a Seventh Circuit case involving a bag that was searched during bus transit, *United States v. Ward,* 144 F.3d 1024, 1030-33 (7th Cir.1998) (*Ward*) ("Although [the officer] lacked a reasonable basis to 'seize' the bag ... we do not agree that the bag was in fact seized in a way that implicated [the defendant's] Fourth Amendment interests.... We are talking now solely about the removal of the bag from the common luggage area of the bus.").

The government sums up its argument as follows:

> The investigators' activities with the bag in the instant case to the point where they first discussed the bag with [defendant] in the terminal office was not a constitutional seizure because it in no way produced any meaningful interference with [defendant's] possessory interest in the bag. Taking the bag from the refueling area to the baggage office and to then find and converse with the bag owner required no constitutional "reasonable suspicion" because no constitutional seizure is disclosed by these facts. This assertion is buttressed by the testimony of Investigator Eberle to the effect that the officers were merely complying with Greyhound's wishes, and that as far as Investigator Eberle was concerned the bag was still in the "custody" of Greyhound even when he removed it to the office in the terminal.

Brief for Appellant at 12.

We disagree with the government's assertion that, in the present case, the officers' handling of defendant's garment bag, prior to the point at which Eberle asked defendant for consent to search the bag, "in no way produced any meaningful interference with [defendant's] possessory interest in the bag." *Id.* This court has made clear that neither the mere removal of an item from its ordinary stream of travel, nor the distance it is moved, disposes of the Fourth Amendment "seizure" issue. Our precedents establish that a Fourth Amendment seizure occurs when an official "exert[s] dominion and control over the [item] by deciding to go beyond a superficial inspection of the exterior of the [item] and to detain the [item] for further inquiry into characteristics that [cannot] be observed by merely holding the [item]." *Gomez*, 312 F.3d at 923 n. 2, *cited in United States v. Morones*, 355 F.3d 1108, 1111 (8th Cir.2004).

Defendant had a reasonable expectation of privacy in the contents of his garment bag. That is not to say that defendant reasonably could expect that no one would handle, observe,

touch, or move his garment bag. A bus passenger who has left his or her bag in a common luggage compartment of a bus reasonably expects the bag to be subject to some degree of handling and movement by others. "Passengers have no objective, reasonable expectation that their baggage will never be moved once placed in an overhead compartment. It is not uncommon for the bus driver or a fellow passenger to rearrange the baggage in the overhead compartment or to temporarily remove the baggage and place it in a seat or in the aisle in order to rearrange and maximize the use of limited compartment space." *Harvey,* 961 F.2d at 1363-64 (removal of bag from overhead compartment of bus and placement in the aisle was not a seizure of the bag under the Fourth Amendment); *accord Ward,* 144 F.3d at 1032 (mere removal of bag from common luggage area of a bus was not a seizure implicating Fourth Amendment interests); *cf. Demoss,* 279 F.3d at 635-36 ("While [defendant's] expectation that the package would not be opened and searched en route was legitimate, ... there could be no expectation that the package would not be handled or that its physical attributes would not or could not be observed.").

However, a bus passenger traveling with luggage placed in a common compartment of the bus does not reasonably expect that his or her luggage will be physically removed from the bus without his or her knowledge and detained so that consent to a search of the luggage may be sought. In such a situation, a detention for the purpose of seeking consent to search is not materially different from a detention for the purpose of conducting a canine sniff. In either situation, the item in question is detained to pursue investigative measures beyond what reasonably should be expected by an individual having possessory interests in the item. Indeed, the Seventh Circuit's decision in *Ward,* upon which the government relies, supports this view. In that case, the Seventh Circuit reasoned that the owner of a bag, which was being shipped by bus without any accompanying passenger, had no reasonable expectation that the bag, having been surrendered to the bus company for

transport, would not be touched, handled, or even removed from the bus while en route to its destination; however, the court went on to hold that, when the officer-having unsuccessfully attempted to identify the bag's owner-then decided to detain the bag for purposes of conducting a canine sniff, he *did* seize the bag within the meaning of the Fourth Amendment. *Ward,* 144 F.3d at 1033-34 ("[H]is initial decision to detain the bag for the canine sniff risked a delay for which the Fourth Amendment would require justification."); *cf. Walker,* 324 F.3d at 1036 ("It is clear under our precedent that when [the postal inspector] moved the package to a separate room for a canine sniff, the package was seized for Fourth Amendment purposes.") (citing *Demoss,* 279 F.3d at 636-37). We therefore hold in the present case that defendant's garment bag was seized within the meaning of the Fourth Amendment when Eberle had the bag removed from the bus, taken to a room inside the rear baggage terminal, and detained while the officer endeavored to locate the bag's owner and obtain consent to search the bag. Because there is no dispute in the present case that Eberle lacked reasonable suspicion to support a seizure of the garment bag if one occurred,[5] we hold that the seizure violated defendant's rights under the Fourth Amendment. The seizure of defendant's garment bag without reasonable suspicion was unconstitutional notwithstanding the government's claims that Greyhound had asked NSP not to bring passengers into the refueling area, that Eberle believed the bag remained in Greyhound's custody at all relevant times, and that defendant was unaware that his garment bag was being removed from the bus and handled by the NSP officers.

[5]The government expressly declines to challenge the district court's adverse holding that Eberle lacked reasonable suspicion to support a seizure of the garment bag if one occurred when the bag was removed from the refueling area and brought to the rear baggage terminal. *See* Brief for Appellant at 5 ("[T]he United States does *not* advance the proposition that there was reasonable suspicion to remove the garment bag from the area where the bus was being refueled to the office in the bus terminal itself.") (emphasis original).

The government further argues that the district court clearly erred in finding that defendant did not voluntarily consent to the search of his garment bag and that he also did not explicitly consent to the search. Brief for Appellant at 13 (quoting District Court Order at 14 ("Certainly the defendant did not explicitly consent to the search. Based on all these factors, I conclude that the defendant's consent was not voluntarily given.")). The government explains that it is separately challenging the district court's failure to find express consent because "[c]learly an explicit consent carries a presumption of voluntariness that might be harder to discern in an implicit consent." Brief for Appellant at 16. However, regarding the district court's separate adverse finding that defendant's consent was not an independent act of free will, *see* District Court Order at 16, the government asserts:

> The district court's discussion of whether the defendant's consent to search was a[n] "independent act of free will that broke the causal chain between the unconstitutional violation and the consent" is really irrelevant in light of the United States' assertion that no unconstitutional seizure took place. The only question presented is whether the consent-whether it be the implicit consent found by the court below or the explicit consent advanced by the United States on this appeal-was voluntary in light of the totality of the circumstances.

Brief for Appellant at 20-21.

In other words, the government's whole argument vis-a-vis the alleged consent to the search of the garment bag is premised upon the assumption that, when defendant's garment bag was removed from the bus and placed in the room in the rear baggage terminal, no seizure occurred within the meaning of the Fourth Amendment. The government has thus waived the argument that defendant's consent purged the taint of the illegal seizure if an illegal seizure occurred.[6]

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[6]Just as the government has made the tactical decision not to challenge

As the district court explained, the law is well-established that, if the garment bag was seized in violation of the Fourth Amendment, the evidentiary fruits of that seizure must be suppressed unless the government, in relying upon defendant's consent to the search, can prove (1) that the consent was voluntary *and* (2) that it was an independent act of free will that broke the chain of causation between the illegal seizure and the consent that permitted the discovery of evidence. *See* District Court Order at 12-14 ("The challenged evidence is admissible if 1) the consent was voluntarily given, and 2) the consent was 'an independent act of free will.' ") (citing *United States v. Chavez-Villarreal,* 3 F.3d 124, 127 (5th Cir.1993)); *see also United States v. Becker,* 333 F.3d 858, 861-62 (8th Cir.2003) ("Even if [the defendant's] consent to the search was voluntary, we must also consider, for purposes of the Fourth Amendment, whether [the defendant's] consent was given in circumstances that render it an independent, lawful cause of [the officer's] discovery of the methamphetamine")[7]; *United States v. Ramos,* 42 F.3d 1160, 1164 (8th Cir.1994) (where the defendants were detained in violation of the Fourth Amendment, "[t]he further question [was] whether [one of the defendant's] consent, found to be voluntary by the District Court, was 'sufficiently an act of free will to purge the primary taint.' ") (citing *Wong Sun v.*

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the district court's lack-of-reasonable-suspicion holding in this interlocutory appeal, *see supra* note 5, so too has the government decided not to challenge the district court's adverse finding that defendant's alleged consent was not an independent act of free will that broke the causal chain between the unlawful seizure and the alleged consent leading to the search of the garment bag.

[7]Regarding this second factor-that is, whether the consent was an independent act of free will-this court further explained: "In determining whether the taint is purged from evidence seized during the allegedly unlawful detention, we consider the following factors: (1) the temporal proximity between the illegal search or seizure and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *United States v. Becker,* 333 F.3d 858, 862 (8th Cir.2003) (citing *Brown v. Illinois,* 422 U.S. 590, 603-04, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)).

United States, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)), *cert. denied,* 514 U.S. 1134, 115 S.Ct. 2015, 131 L.Ed.2d 1013 (1995); *Brown v. Illinois,* 422 U.S. 590, 601-02, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) ("[E]ven if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.' ").

The government bears the burden to prove that defendant gave consent that was both voluntary and an independent act of free will. *See Brown v. Illinois,* 422 U.S. at 604, 95 S.Ct. 2254 ("And the burden of showing admissibility rests, of course, on the prosecution."). In light of the government's tactical decision in the present interlocutory appeal *not* to challenge the district court's adverse finding that defendant's alleged consent was not an independent act of free will, the exclusionary rule applies. Accordingly, we need not consider whether the district court clearly erred in its findings concerning the voluntariness of defendant's alleged consent.

Conclusion

The order of the district court granting defendant's motion to suppress is affirmed.

MELLOY, Circuit Judge, concurring.

I concur in the result of this case because I believe the seizure issue is controlled by this Court's decision in *United States v. Demoss,* 279 F.3d 632 (8th Cir.2002). *See also, United States v. Walker,* 324 F.3d 1032 (8th Cir.2003); and *United States v. Morones,* 355 F.3d 1108 (8th Cir.2004). *Demoss* held that the removal of a package from a Federal Express conveyor belt to a nearby room for further inspection constituted a seizure. *Demoss,* 279 F.3d at 636. In this case, the removal was even

more intrusive than the removal the Court held to be a seizure in *Demoss*. In *Demoss*, the package had been given to Federal Express for delivery. In our case, Mr. Va Lerie was traveling on the same bus with his luggage, and the luggage was removed from the checked luggage bin of the bus to a separate building. For purposes of Fourth Amendment analysis, I find the present facts to be indistinguishable from *Demoss* and, therefore, based upon our prior precedent, a seizure occurred.

It is also important to note that the government expressly conceded that there was no reasonable suspicion to remove Mr. Va Lerie's luggage. As the majority opinion notes, the government also elected, in this case, not to argue that Mr. Va Lerie's consent to search purged the taint of the illegal seizure. The government made the tactical decision to challenge the district court decision solely on the grounds that the district court was wrong in its ruling that a seizure occurred. Based upon our prior precedent, I believe the majority correctly analyzed that issue, and the luggage was seized.

Having said that, however, I believe that our prior precedent dealing with the definition of a seizure is of questionable validity. Specifically, I join in Judge Hansen's well-written concurrence in *Demoss*. I believe that our cases place undue emphasis on the issue of whether there was more than a superficial review of the package, or whether the package (or in this case, a piece of luggage) was moved to another room. Proper analysis requires consideration of the temporal element of the inspection. I believe that a brief detention of a piece of luggage that does not result in the delay of either the passenger, or ultimate delivery of the luggage, is not a seizure. Other circuits have so held. *See, e.g., United States v. Johnson*, 990 F.2d 1129, 1132 (9th Cir.1992); *United States v. Ward*, 144 F.3d 1024, 1031-32 (7th Cir.1998); and *United States v. Lovell*, 849 F.2d 910, 916 (5th Cir.1988).

To be fair to the appellee in this case, the record is not well developed on the issue of whether the removal of the luggage

from the bus would have resulted in any delay in its ultimate delivery. Like many cases, this one evolved through the litigation process. At the initial hearing before the magistrate judge, the parties focused the evidentiary record on whether there was reasonable suspicion to seize the luggage and whether the defendant consented to the search. The parties seemed to assume that a seizure occurred. It was not until later that the government abandoned the reasonable suspicion argument and focused on the seizure issue. Consequently, the record is unclear as to what delay, if any, there may have been in the ultimate delivery of the luggage. The record is clear that the bus had not left at the time the drugs were discovered because officers went onto the bus to remove Mr. Va Lerie's carry-on items after the search. It is unclear, however, how much time elapsed between the removal of the luggage from the luggage bin and the discovery of the drugs. It does appear that this time period was fairly brief. It is also unclear as to whether the bus was held by law enforcement to allow for the removal of the carry-on items or whether the scheduled departure had not yet occurred (assuming those facts are even relevant).

In sum, I concur. I believe that based upon our prior precedent, a seizure occurred. At some point, however, I believe our circuit should re-visit the issue of what constitutes a seizure in the context of a temporary removal and inspection of packages and luggage that have been sent or checked with common carriers.

RILEY, Circuit Judge, dissenting.

Our federal Constitution mandates "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV; *see United States v. Ameling*, 328 F.3d 443, 447 (8th Cir.2003) (Fourth Amendment applies to states through the Fourteenth Amendment). This appeal asks whether the Nebraska State Patrol's (NSP) removal of a commercial bus passenger's checked luggage from the bus's

lower luggage compartment to a room inside the bus terminal constituted an unreasonable seizure in violation of the Fourth Amendment. Because Eighth Circuit precedent in this area has evolved into different lines of authority, and because I would not follow the line chosen by the majority, I respectfully dissent. Based on my analysis of this circuit's precedent, I would hold law enforcement's temporary removal of a commercial bus passenger's checked luggage from a lower luggage compartment to a room inside the terminal does not constitute a seizure if the removal of the luggage does not delay the passenger's travel, affect the timely delivery of the checked luggage, or interfere with the carrier's normal processing of the checked luggage. I also join Judge Melloy's plea to our circuit to "re-visit the issue of what constitutes a seizure in the context of a temporary removal and inspection of packages and luggage that have been sent or checked with common carriers."

This panel has no authority to overrule a prior panel's decision; only the court sitting en banc can take such action. *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 899 (8th Cir.2002). However, when a panel is confronted with varying lines of cases, the panel is "free to chose which line of cases to follow." *Kostelec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220, 1228 n. 8 (8th Cir.1995).

Our circuit's precedent on what constitutes a seizure in cases involving checked luggage or mailed packages is not a model of clarity. *Compare United States v. Gomez*, 312 F.3d 920, 923-24 (8th Cir.2002) (holding no seizure occurred when a drug interdiction officer at a U.S. Postal Service facility moved a package to a command center twenty yards from a conveyor belt in a sorting area), *United States v. Vasquez*, 213 F.3d 425, 426 (8th Cir.2000) (holding no seizure occurred when drug interdiction officers at a Federal Express facility subjected a package to a drug-sniffing dog), *United States v. Harvey*, 961 F.2d 1361, 1363-64 (8th Cir.1992) (holding no seizure occurred when police removed luggage from a bus's overhead luggage

compartment to subject the luggage to a drug-sniffing dog), *and United States v. Riley,* 927 F.2d 1045, 1048 n. 4 (8th Cir.1991) (implying no seizure occurred when police subjected an airline passenger's checked luggage to a drug-sniffing dog), *with United States v. Morones,* 355 F.3d 1108, 1111 (8th Cir.2004) (holding seizure occurred when a law enforcement officer at a Federal Express facility removed a package from a conveyor belt to subject the package to a drug-sniffing dog), *and United States v. Demoss,* 279 F.3d 632, 636 (8th Cir.2002) (same). Following the principles enunciated in *Harvey, Vasquez* and *Gomez,* I conclude the removal of Va Lerie's checked luggage from the bus's lower luggage compartment to a room inside the terminal was not a seizure under the Fourth Amendment.

The Fourth Amendment protects against both unreasonable searches and unreasonable seizures. The Supreme Court has stated "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). The Court declared "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id.* The Court recognized seizure relates to freedom of movement: "While the concept of a 'seizure' of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment-meaningful interference, however brief, with an individual's freedom of movement." *Id.* n. 5.

This is not a search case; this is a seizure case. And this is not a seizure case involving luggage physically possessed by a commercial bus passenger. *See United States v. Place,* 462 U.S. 696, 708, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (recognizing detention of luggage within passenger's immediate possession intrudes on passenger's freedom of movement, in addition to the luggage's freedom of movement, such that the

passenger's travel plans may be disrupted). This case involves checked luggage, which a passenger cannot claim until the luggage reaches its destination.[8]

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[8]A casual observer might cite *Florida v. Royer*, 460 U.S. 491, 507, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), to support the district court's decision in this case. A plurality in *Royer* held an airline passenger had been detained in violation of the Fourth Amendment. In *Royer*, 460 U.S. at 493, 103 S.Ct. 1319, law enforcement officers became suspicious of an airline passenger who fit a drug courier profile. The officers approached the passenger in the airport terminal after the passenger had checked his luggage and headed for his boarding area. Ultimately, the officers and the passenger ended up in a private room off the concourse. The officers also retrieved the passenger's luggage from the airline and brought the luggage to the room. When asked whether the officers could search the luggage, the passenger produced a key and unlocked one piece of luggage. A fractured Supreme Court asked whether a state court properly applied Fourth Amendment principles in holding the airline passenger "was being illegally detained at the time of his purported consent to a search of his luggage." *Id.* While five justices held the passenger had been detained in violation of his Fourth Amendment rights, only three justices (Justices White, Marshall and Stevens) mentioned the possibility that an illegal seizure of the passenger's luggage had occurred. *Id.* at 503, 103 S.Ct. 1319 (stating the officers had the passenger and his seized luggage in the private room). These justices did not discuss the seizure issue or their analysis in concluding the luggage had been seized. Instead, these justices simply stated the luggage had been seized. Justice Powell, who cast the critical fifth vote, wrote a separate concurrence in which he focused on the passenger, not the luggage. In doing so, he referenced how the officers, when they met with the passenger in the private room, "already had obtained possession of his checked luggage." *Id.* at 508, 103 S.Ct. 1319 (Powell, J., concurring). Justice Brennan, who wrote a separate concurrence, did not discuss whether the luggage had been seized, but rather wrote the passenger had been seized illegally when the officers first stopped the passenger. *Id.* at 511, 103 S.Ct. 13191 (Brennan, J., concurring). Justice Blackmun, who wrote a separate dissent concluding the passenger's Fourth Amendment rights had not been violated, wrote "[t]he officers acted reasonably in taking [the passenger]' s baggage stubs and bringing his luggage to the police room without his consent." *Id.* at 518 n. 3, 103 S.Ct. 1319 (Blackmun, J., dissenting). Finally, Justice Rehnquist, with whom Chief Justice Burger and Justice O'Connor joined, wrote a separate dissent concluding the officers' conduct was reasonable and the passenger's Fourth Amendment rights had not been violated. *Id.* at 519-32, 103 S.Ct. 1319 (Rehnquist, J., dissenting). At no

To understand the state of Eighth Circuit precedent in Fourth Amendment seizure cases, I will discuss a few cases which, to me, announce different standards, reach inconsistent results, and create a division in our circuit authority. In *United States v. Harvey*, 961 F.2d 1361, 1362 (8th Cir.1992), police officers and a drug-sniffing dog, on a mission to find illegal drugs, boarded a Greyhound bus after it stopped for cleaning and refueling. The dog alerted to an overhead luggage compartment. The officers removed some luggage from the overhead compartment, and the dog alerted to two bags. The officers returned the bags to the overhead compartment and exited the bus. After the passengers re-boarded the bus, the officers asked who owned the bags to which the dog had alerted. When two passengers acknowledged they owned the bags, the officers asked them to take their bags off the bus and wait for the officers. Confronted with the question whether the removal of the bags from the overhead compartment constituted an unlawful seizure, we held it did not. *Id.* at 1363. Our court held "there was no meaningful interference with [the passengers]' possessory interests in their baggage," because "the temporary removal of the bags caused no delay to [their] travel."[9] *Id.* at 1364.

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point did Justice Rehnquist intimate the officers seized the passenger's luggage when they retrieved the luggage from the airline. Understanding our seizure precedent is a formidable task by itself. Trying to understand and apply the Supreme Court's decision in *Royer* is even more daunting. Suffice it to say, a majority of justices in *Royer* did not agree on-and certainly did not articulate-a standard to be applied in Fourth Amendment seizure cases involving checked luggage. Therefore, I cannot rely on *Royer*, but relegate *Royer* to this footnote.

[9]Our decision in *Harvey* was later cited by a federal district court in Kansas. In *United States v. Wood*, 6 F.Supp.2d 1213, 1224 (D.Kan.1998) (citing *Harvey*, 961 F.2d at 1363-64), the district court relied on *Harvey* in pronouncing "a seizure [does not] occur when baggage is temporarily removed from one public area to another without causing any delay in travel plans." The court held the only possessory interest a mailer of a package has is a "contract-based expectancy that the package would be delivered to the designated address" at the expected time. *Id.* (quoting *United States v.*

In *United States v. Vasquez,* 213 F.3d 425, 426 (8th Cir.2000), drug interdiction officers examined packages at a Federal Express sorting station. When the officers' suspicions about a certain package became aroused, the officers used a drug-sniffing dog to sniff the package. After the dog alerted to the package, the officers detained the package, and later obtained a search warrant. Asking whether the officers seized the package, our court held "the officers' actions in examining the outside of the package and then subjecting the package to a dog sniff as it sat at the rear of the delivery truck do not constitute a detention requiring a reasonable, articulable suspicion because, at that point, the officers had not delayed or otherwise interfered with the normal processing of the package." *Id.* In reaching this conclusion, the court relied on *Harvey* and *United States v. Ward,* 144 F.3d 1024 (7th Cir.1998). Having already discussed *Harvey,* I will discuss the Seventh Circuit's decision in *Ward.*

In *Ward,* 144 F.3d at 1027, an individual checked a bag with a Greyhound luggage handler, who placed the bag in the luggage compartment accessible only from the outside. The bag's owner did not board the bus, but instead flew to the bus's destination to await the bus and claim the bag. When the bus stopped for a passenger meal break, drug enforcement officers questioned some bus passengers. When an officer's investigation led him to the outside luggage compartment, he noticed a suspicious bag. When no passenger claimed ownership of the bag, the officer removed the bag from the bus to subject the bag to a drug-sniffing dog. Before a dog could arrive at the bus station, the bus left without the detained bag. When a dog finally arrived, it alerted to the bag. Once a search warrant was obtained, the officer searched the bag and discovered a kilogram of cocaine and a semi-automatic handgun loaded with hollow-point bullets. Drug enforcement officers then set up a sting at the bus's final destination, and

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LaFrance, 879 F.2d 1, 7 (1st Cir.1989)).

caught the bag's owner as he attempted to claim his bag.

Did the drug enforcement officers violate the bag owner's Fourth Amendment rights by unlawfully seizing his bag? The Seventh Circuit held they did not. *Id.* at 1032-34. The bag's owner argued the officers were constitutionally authorized only to handle the bag and remove it from the compartment. The Seventh Circuit disagreed, and recognized the defendant "could reasonably have foreseen that the bag would be handled, moved around, and even taken off the bus, whether at intermediate stops when the driver might need to remove the bag to sort and/or gain access to other luggage, or at a hub like St. Louis where the bag would have been transferred to another bus. He could have no reasonable expectation, in other words, that the bag would not be touched, handled, or even removed from the bus prior to the bag's arrival" at its destination. *Id.* at 1032. Thus, the court held the detention of the bag would have been a seizure only when it "interfer[ed] with [the defendant]'s contractually-based expectation that he would regain possession of the bag at a particular time." *Id.* at 1033.

In *United States v. Demoss,* 279 F.3d 632, 634 (8th Cir.2002), a law enforcement officer was working drug interdiction at a Federal Express facility when he noticed a suspicious package. The officer removed the package from a conveyor belt, and then noticed some indicators the package contained drugs. The officer took the package to another room in the facility and subjected the package to a dog sniff. Based on these facts, the court asked when a Fourth Amendment seizure occurred. The court concluded no seizure occurred when the officer removed the package from the conveyor belt. *Id.* at 635. However, the court held the package was seized when the officer "moved the package away from the conveyor belt and detained the package for a canine sniff," because the officer "exert[ed] dominion and control over the package." *Id.* at 636 (quoting *Jacobsen,* 466 U.S. at 121 n. 18, 104 S.Ct. 1652) (alteration in original). Notwithstanding the seizure

holding, the court held the seizure was not unreasonable because the officer had reasonable suspicion to detain the package. *Id.* at 636-37, 104 S.Ct. 1652.

The court's ultimate holding garnered the concurrence of Judge Hansen, who wrote separately to state his belief "that no seizure occurred in this case until [the officer] infringed upon [the defendant]'s interest in the timely delivery of the package." *Id.* at 637 (Hansen, J., concurring). In reaching this conclusion, Judge Hansen discussed *Harvey, Vasquez* and *Ward,* focusing his Fourth Amendment seizure analysis on whether a package's "ultimate contracted for timely delivery [is] frustrated." *Id.* at 640. Judge Hansen also impliedly recognized our seizure jurisprudence has not been settled: "I choose to cast my lot with those cases both from this and other circuits indicating that a piece of luggage or mail delivered to a common carrier is not 'seized' within the meaning of the Fourth Amendment until the authorities have interfered with a possessory interest in the luggage or mail such that the expectation of timely delivery of the package or luggage has been frustrated." *Id.*

Ten months after our court decided *Demoss,* we decided *United States v. Gomez,* 312 F.3d 920, 923 (8th Cir.2002), in which we said removing a package at a post office from a conveyor belt to a position twenty yards away "was minimal interference with [the mailer]'s possessory interest in the package." We further stated, "When the package was taken to the command post, away from the normal activity near the conveyor belt but still within the confines of the processing center, it was merely 'stopped,' and reasonable suspicion was not required for that stop." *Id.* at 923-24. Specifically distinguishing *Demoss,* the court ultimately held the package "was not seized until [the officer] opted not to return it to the conveyor belt for transfer to its intended destination, that is, until he 'exert[ed] dominion and control over the package for [his] own purposes.' " *Id.* at 924 (quoting *Jacobsen,* 466 U.S. at 121 n. 18, 104 S.Ct. 1652) (alteration in original).

Finally, our court again addressed a seizure issue earlier this year. In *United States v. Morones,* 355 F.3d 1108, 1110 (8th Cir.2004), a police officer was inspecting packages at a Federal Express facility when he removed a package from a conveyor belt, set it aside, and retrieved a drug-sniffing dog, which alerted to the package. Our court held the officer "exercised 'meaningful interference' with [the mailer]'s 'possessory interests' in the package-that is, he seized it-when he removed it from the mail stream and held it for the dog sniff." *Id.* at 1111.

If anything is clear, it is that our seizure cases involving checked luggage and mailed packages are not.

The doctrine of stare decisis, which means to stand by things decided, "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). The Supreme Court has recognized "the important doctrine of stare decisis ... ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery,* 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). The Court also has acknowledged stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Id.* at 265-66, 106 S.Ct. 617.

It is absolutely critical that citizens and law enforcement understand what the Fourth Amendment protects. Unfortunately, our decisions in the Fourth Amendment seizure area do not clearly enunciate and faithfully apply a consistent standard. Our court should uniformly resolve Fourth Amendment seizure cases to help our citizens understand the freedoms guaranteed by their Constitution. Consistent

resolution of these cases also will ensure law enforcement fulfills its solemn duties in a constitutional manner. Although any debate over the scope of the Seizure Clause of the Fourth Amendment necessarily and rightly concentrates on the rights of our citizens, there should be little debate that law enforcement officers must understand what conduct the Fourth Amendment authorizes and what conduct it condemns.

Efforts to rid our society of illegal drugs are indeed solemn tasks: "The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs ... may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement." *United States v. Mendenhall,* 446 U.S. 544, 561-62, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (Powell, J., concurring). I urge the court to speak with one voice about the appropriate standard for Fourth Amendment seizure cases.

When studying our circuit's seizure cases, do our holdings depend on how far law enforcement officers move a package or piece of luggage? Do we focus on the commercial traveler's expectations? Do we fully discuss what possessory interests a commercial traveler has in his checked luggage? One principle which is beyond reproach is commercial travelers expect their luggage to be handled. Of course, if their luggage were not handled, it could hardly reach its destination. It would seem obvious that, once a traveler checks his luggage, he gives up his immediate possessory interests in that luggage until he claims his luggage at its destination. During his travel, he must expect his luggage to endure a fair amount of handling, including the removal of his luggage from the luggage compartment. For instance, a commercial passenger's luggage may be damaged in

transit and require removal from the luggage compartment. If a bus breaks down, a passenger should expect his luggage to be removed from the luggage compartment and either transferred to another bus or taken inside the bus terminal. When a bus reaches its destination, every passenger expects-or at least hopes-his luggage survived the trip and will be removed from the bus and taken to the luggage claim area. Thus, I conclude the Fourth Amendment does not frown on law enforcement handling luggage checked by a commercial bus passenger to the same degree as a reasonable traveler would expect the bus company's employees to handle the luggage, as long as any interference does not delay the traveler or frustrate his expectations of timely delivery at the luggage's destination.

If painting on a blank canvas, Judge Melloy would hold "a brief detention of a piece of [checked] luggage that does not result in the delay of either the passenger, or ultimate delivery of the luggage, is not a seizure." I agree with this standard, as have other circuits. *See, e.g., Ward,* 144 F.3d at 1031-32; *United States v. Johnson,* 990 F.2d 1129, 1132 (9th Cir.1992); *United States v. Lovell,* 849 F.2d 910, 916 (5th Cir.1988). As discussed above, I also believe some of our cases already have announced-and even applied-this standard.

The NSP's handling of Va Lerie's luggage did not constitute a seizure under the Fourth Amendment, because the handling did not amount to a meaningful interference with Va Lerie's possessory interest in his luggage nor impact Va Lerie's freedom of movement. When the NSP removed Va Lerie's checked luggage from the bus's lower luggage compartment to a room inside the terminal and asked Va Lerie to consent to a search of his luggage, Va Lerie's travel was not delayed. While Va Lerie reasonably should have expected his checked luggage would be handled by Greyhound employees, Va Lerie's possessory interest in his checked luggage certainly did not include an expectation that Greyhound-or others at Greyhound's request-would not remove the luggage from the

lower luggage compartment. The NSP removed Va Lerie's checked luggage from the lower luggage compartment to a room inside the terminal at Greyhound's request, and the NSP never took custody of the luggage from Greyhound. Had the NSP ignored Greyhound's request to remove the luggage from the lower luggage compartment to a room inside the terminal and asked Va Lerie for consent to search while standing by the bus, I cannot imagine this court holding an unlawful seizure occurred. By handling the luggage in a way requested by Greyhound and consistent with Va Lerie's expectations as to how his luggage would be handled, I cannot comprehend how this constitutes a meaningful interference with Va Lerie's possessory interest in his luggage. Applying the proper Fourth Amendment seizure principles to this case, I conclude an unreasonable seizure did not occur when the NSP removed Va Lerie's checked luggage from the lower luggage compartment to a room inside the terminal to ask Va Lerie for consent to search the luggage.[10]

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[10]Two other issues lurk beneath the surface in this case. First, do Fourth Amendment seizure principles change depending on whether we confront checked luggage at the airline terminal or checked luggage at the bus terminal? Second, do domestic and worldwide terrorist events involving commercial transportation impact our Fourth Amendment seizure analysis involving checked luggage? The district court made a cursory pass at these issues. Specifically, the district court discussed the impact the tragic events of September 11, 2001, have on commercial travel in America and on Fourth Amendment seizure jurisprudence. The district court stated "[p]assengers on a bus-unlike airline passengers-still retain some expectation of privacy in their baggage that the court is required to protect," and also opined "train passengers-and presumably bus passengers as well-have not yet had to surrender all subjective expectations of privacy in their personal luggage." *United States v. Va Lerie,* No. 8:03CR23, 2003 WL 21956437, *2-3 (D.Neb. Aug.14, 2003). However, the district court also recognized we live in a dramatically altered world since our Nation was attacked on September 11: "Based on the national security measures introduced following the events of 9/11, air travelers can no longer have a subjective expectation of privacy in luggage or personal property. However, national security concerns with bus and train travel are somewhat less pressing than those with air travel.... Because the mandatory search provisions for luggage

and packages put on airplanes do not apply to trains or buses, train or bus travelers can at least argue that they have a subjective expectation of privacy in their personal property, subject to the many qualifications already imposed by Fourth Amendment case law. But whether a post-9/11 society would recognize any mass transit traveler's subjective expectation of privacy as objectively reasonable is, obviously, another matter." *Id.* 2003 WL 21956437 at *3 n. 1 (citations omitted). Ultimately, the district court concluded that, "until Congress or the Eighth Circuit decides differently, a bus passenger's subjective expectation of privacy, however limited, is one that society is prepared to recognize as reasonable." *Id.* 2003 WL 21956437 at *3. Since the district court penned these words, we have witnessed terrorist bombings of trains in Madrid, Spain, numerous bus bombings in Israel, and bombings in other nations.

The district court raises issues vitally important to this Nation. However, I do not need to address these issues at this time in this case, because Fourth Amendment seizure principles dictate Va Lerie's checked luggage was not seized when it was removed from the bus to a room inside the terminal.

(3)

Supreme Court, U.S.
FILED
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No. 05-1058

In the Supreme Court of the United States

KEITH A. VA LERIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's checked luggage was seized within the meaning of the Fourth Amendment when law enforcement officers, following a procedure requested by the bus company, removed the luggage from the baggage compartment of the bus to a room in the bus terminal in order to seek petitioner's consent to search his luggage, where the removal did not delay the travel of either petitioner or his luggage.

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In the Supreme Court of the United States

No. 05-1058

KEITH A. VA LERIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 424 F.3d 694. The panel opinion of the court of appeals (Pet. App. 65a-91a) is reported at 385 F.3d 1141. The opinion of the district court (Pet. App. 35a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2005. On December 27, 2005, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 16, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of Nebraska on one count of possession with intent to distribute 500 or more grams of a substance containing cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1). Pet. App. 1a, 51a. As relevant here, the magistrate judge recommended that petitioner's motion to suppress the drug evidence be denied, *id.* at 51a-63a, but the district court granted the motion, *id.* at 35a-49a. The government appealed, and a divided panel of the court of appeals affirmed. *Id.* at 65a-91a. On rehearing en banc, the full court of appeals reversed and remanded for trial. *Id.* at 1a-34a.

1. On December 23, 2002, petitioner was traveling on a Greyhound bus from Los Angeles, California to Washington, D.C. At about noon, the bus stopped for refueling at a bus station in Omaha, Nebraska. During refueling and cleaning, Greyhound requires its passengers to wait inside the terminal. Pet. App. 2a. Nebraska State Patrol Investigator Alan Eberle, a drug interdiction officer, looked inside the lower baggage compartments on the bus, where he noticed a new-looking bag with a baggage claim ticket that contained a name but no telephone number. The bag had no other name tag. *Ibid.*; Tr. 6-11. Investigator Eberle ran a computer check and learned that the person who checked the bag had purchased a one-way ticket on the day of travel and paid $164 in cash. Pet. App. 2a; Tr. 11-12, 63. Investigator Eberle decided to ask the owner of the bag for consent to search it. Because Greyhound had requested that investigators not bring passengers to the refueling area, Investigator Eberle had another investigator take

the bag into the rear baggage room inside the bus terminal. Pet. App. 2a; Tr. 12-13, 58-59. See Pet. App. 52a.

Investigator Eberle paged petitioner, who approached the ticket counter in response. Investigator Eberle, who was wearing jeans, a t-shirt, and a winter coat, displayed his badge, identified himself as a law enforcement officer, and told petitioner he was not in any trouble or under arrest. Petitioner agreed to speak with Investigator Eberle and showed him his bus ticket and identification, which matched the information on the piece of luggage from the bus. Pet. App. 2a-3a; Tr. 12-15. Petitioner then agreed to accompany Investigator Eberle to a room in the rear baggage terminal, and once there, he confirmed that the bag was his. Investigator Eberle then explained that he was a narcotics investigator, and he asked for consent to search petitioner's bag. Petitioner consented, and a search of the bag revealed five vacuum-sealed bags of cocaine. Pet. App. 2a-3a; Tr. 17-22. See Pet. App. 52a-54a.

2. Following an evidentiary hearing on petitioner's motion to suppress, the magistrate judge recommended that the motion to suppress the drug evidence be denied. Pet. App. 63a. The magistrate judge concluded that the officers had reasonable suspicion to detain the bag briefly and that the detention was minimally intrusive and not unreasonable under the Fourth Amendment. *Id.* at 56a-58a. The magistrate judge also concluded that petitioner voluntarily consented to the search of the luggage. *Id.* at 59a-60a.[1]

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[1] Petitioner also moved to suppress statements he had made after his arrest. The magistrate judge recommended that the statements be suppressed for all purposes, including impeachment, Pet. App. 61a-63a; the district court agreed, *id.* at 49a; and the government did not appeal from that ruling, *id.* at 67a-68a n.3.

The district court sustained petitioner's objections to the magistrate judge's recommendation and suppressed the drug evidence. Pet. App. 35a-49a. The district court concluded that the removal of the bag to a room inside the terminal without petitioner's knowledge or consent was a substantial interference with his possessory interest in the bag. The court further concluded that the information possessed by Investigator Eberle did not amount to reasonable suspicion to detain petitioner's luggage. The court therefore held that the bag had been seized in violation of the Fourth Amendment. *Id.* at 38a-45a. The district court also concluded that petitioner's consent to the search of the bag did not vitiate the illegal seizure. Petitioner's consent was not voluntary, the court held, because under all the circumstances, no reasonable person would think he had a choice to refuse consent; furthermore, the court concluded that not enough time had passed to show that petitioner's consent broke the causal chain between the illegal seizure and the consent. *Id.* at 45a-49a.

3. A divided panel of the court of appeals affirmed. Pet. App. 65a-91a. The panel held that the bag was seized when the officers removed it from the bus, took it into a rear baggage room, and detained it while the officers attempted to locate its owner. *Id.* at 72a-74a. The court of appeals therefore concluded that the seizure violated the Fourth Amendment.[2]

Judge Melloy concurred, concluding that the court of appeals' decision in *United States* v. *Demoss*, 279 F.3d 632 (8th Cir. 2002), dictated affirmance. Pet. App. 77a-

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[2] The government did not contend on appeal that it had reasonable suspicion to detain the bag. Pet. App. 74a & n.5, or that petitioner's consent to search the bag vitiated any unlawful seizure, *id.* at 75a-76a & n.6.

79a. Questioning the court of appeals' precedents on the definition of a seizure, however, Judge Melloy called for the full court to revisit the issue. *Id.* at 78a-79a. Judge Riley dissented and joined Judge Melloy in urging the court to re-examine the issue. *Id.* at 79a-91a. Judge Riley agreed with Judge Melloy that "a brief detention of a piece of [checked] luggage that does not result in the delay of either the passenger, or ultimate delivery of the luggage, is not a seizure." *Id.* at 89a (quoting *id.* at 78a (Melloy, J., concurring)).

On rehearing en banc, the full court of appeals vacated the panel's decision and reversed the district court's suppression of the drug evidence. Pet. App. 1a-34a. Based on this Court's decision in *United States* v. *Jacobsen*, 466 U.S. 109 (1984), the court of appeals concluded that a seizure of property occurs when the government's actions "constitute[] some meaningful interference with a person's possessory interests." Pet. App. 12a. After surveying the decisions of other courts of appeals dealing with the question whether checked luggage has been seized, see *id.* at 13a-18a, the court concluded that the government's interference with checked luggage is not a seizure as long as the detention (1) did not "delay a passenger's travel or significantly impact the passenger's freedom of movement," (2) did not delay the checked luggage's "timely delivery," and (3) did not deprive "the carrier of its custody of the checked luggage," *id.* at 20a.

Applying that standard to the facts of this case, the court held that petitioner's luggage was not seized within the meaning of the Fourth Amendment. Pet. App. 22a-23a. The "brief and temporary removal of [petitioner's] checked luggage from the luggage compartment to ask [him] to consent to a search did not delay

[his] travel or impact his freedom of movement," nor did it "affect the timely delivery of the luggage." *Id.* at 22a. Furthermore, the court reasoned, any bus passenger would expect that Greyhound personnel, or others at Greyhound's request, might remove the luggage from the compartment; the officers, who would have preferred to bring petitioner to his luggage, only took it from the bus to the baggage room inside the terminal at the request of Greyhound. That action, the court held, did not deprive Greyhound of its custody of petitioner's luggage. *Ibid.*

The court further concluded that petitioner voluntarily consented to the search of his luggage, noting that the facts "strongly support[ed]" the magistrate judge's recommended finding that petitioner voluntarily consented and that, contrary to the district court's view, the officers had no obligation to inform petitioner of his right to refuse consent. Pet. App. 23a-27a. The court therefore reversed the district court's order suppressing the drug evidence and remanded for further proceedings. *Id.* at 27a.

Judge Colloton, joined by four other judges, dissented. The dissent viewed this case as indistinguishable from *Jacobsen*, *supra*, finding that the investigators here, just as in *Jacobsen*, exerted dominion and control over the luggage for law enforcement purposes. Pet. App. 27a-34a.

ARGUMENT

Petitioner contends (Pet. 9-29) that the decision below conflicts with this Court's holding in *United States* v. *Jacobsen*, 466 U.S. 109 (1984), and that confusion in the lower courts exists about how to determine whether a seizure of property has occurred. The court of ap-

peals' interlocutory decision is correct, and further review is not warranted.

1. As an initial matter, the procedural posture of this case makes it an inappropriate vehicle for further review at this time. Petitioner seeks review of an opinion reversing a pretrial suppression order and remanding the case for trial. The decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for denying certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *American Constr. Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., opinion respecting the denial of the petition). If petitioner is acquitted, the claims he raises in the petition will be moot. If he is found guilty, and his conviction is affirmed on appeal, he will be able to raise the same claims—together with any other claims arising from the trial and sentencing—in a certiorari petition that seeks review of the judgment of conviction. For those reasons, this Court ordinarily denies petitions by criminal defendants challenging interlocutory decisions. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). That practice promotes judicial efficiency by ensuring that "all claims can be presented in a single petition if, in fact, the defendant is convicted." *Id.* § 4.18, at 259 n.59.

2. Further review would be unwarranted even if the court of appeals' decision were not interlocutory. The decision below is consistent with this Court's decisions on Fourth Amendment seizures, and it accords with other lower court decisions involving similar circumstances.